

Odd Man Out: Preliminary Findings Concerning the Diminishing Role of Lawyers in the Home-Buying Process

MICHAEL BRAUNSTEIN*

AND

HAZEL GENN**

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I. INTRODUCTION

This paper presents some preliminary results of the United States component of a comparative, empirical study of the workings of the residential real estate markets in the United States and the United Kingdom.¹ Although these markets are of enormous size, no comprehensive study has been made of them from a socio-legal perspective. This paper sets forth some of the preliminary results of a study based on a pretest conducted in Columbus, Ohio during the fall of 1989, and in London, England during the spring of 1990. The Columbus data were collected from lengthy telephone surveys of recent home purchasers and in-person, open-ended interviews of real estate service specialists.

We believe that a productive way of studying the home purchase process is by examining the interaction between home buyers and the various real estate service specialists who facilitate the home transfer process. The most important

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** Reader in Socio-Legal Studies, London University (QMW).

1. The principal investigator for the United States portion of this study is Michael Braunstein; the principal investigator for the United Kingdom portion of the study is Hazel Genn.

of these specialists are real estate agents, lawyers, title companies, appraisers and lenders. "Structural and operational changes . . . can have major consequences for those the process is designed to serve . . . [These changes] can also have repercussions on the entire economy due to the massive size of the American land market and its extension into every local community."²

The research focuses on two issues raised by the purchase process. First, we are concerned with how buyers of residential real estate form expectations concerning the rights and liabilities that they acquire at various stages of the transfer process, from contract signing to closing and post-closing. A second and correlative issue we are concerned with is the role of lawyers in the process of expectation formation. One would envision a significant role for them because real property law consists of complex, often anachronistic rules not readily accessible to the typical home purchaser.

This research is interesting for three reasons. First is the importance of the subject matter. The residential real estate market is important in terms of the amount of money involved,³ the number of households involved, and the value of the transaction to the individual purchaser.⁴

Second, this research lends itself to comparative study. The real property laws of the United States and the United Kingdom are very similar, and often identical. Consequently, it is possible to make relevant cross-cultural comparisons of purchasers' expectations with minimal "translation" to take account of the different legal systems. Notwithstanding similarities of their laws, practices in the two countries differ markedly, particularly with respect to the use of lawyers. Virtually all United Kingdom home buyers retain lawyers while only a relatively small percentage of United States purchasers do so. We expect that this difference will allow us to measure the effect that varying levels of lawyer involvement have on the home purchase process. We believe that the comparative dimension of this study will provide points of reference against which some widely held beliefs about the two legal systems can be challenged and critically evaluated.

Third, this research is important because the home purchase transaction, perhaps more than any other, brings the general population into contact with the formal legal system. It thus provides a broad base from which to gauge how people adapt to a complex legal system which requires them to deal with several strata of real estate service specialties, how effective these adaptations are in terms of the accuracy of the expectations formed about the legal system, and finally, how the legal system reacts as changed circumstances bring into question the factual assumptions that led the common law to assign rights and liabilities in a particular way.

2. Johnstone, *Land Transfers: Process and Processors*, 22 VAL. U.L. REV. 493, 494 (1988).

3. The residential real estate market is enormous. The Franklin County Recorder indicates that in a typical month, 1,700 houses, valued at more than \$180,000,000 are sold in the city of Columbus, Ohio, a mid-sized mid-western American city.

4. Ninety-five per cent of the 132 Columbus home buyers surveyed said that their house was the most valuable asset they owned and 64.5% said that they bought the most expensive house they could afford.

This paper focuses on some of these issues. First we examine the quantity of lawyer involvement in the residential real estate market, examining both why people chose to use lawyers and why they chose not to. Next we consider why lawyers have been displaced from the United States residential real estate market, focusing primarily on the imperialism of title insurance. Third, the impact on consumers of the present structure of the real estate service specialties is considered; and finally, some possible law reform suggested by the preliminary data is discussed.

II. THE CURRENT QUANTITY OF LAWYER INVOLVEMENT

A. *Buyers Who Do Use Lawyers*

Lawyers have been considerably displaced from representation of buyers in the home purchase process. Of the 132 recent Columbus home buyers surveyed, 41 percent hired their own lawyer to represent them in some aspect of the purchase.⁵ For many of those who hired a lawyer, the lawyer was involved fairly early in the process. Almost 75 percent of those who hired a lawyer said that they first consulted their lawyer either before or shortly after signing the contract to purchase. Almost 25 percent, however, indicated that they first met their lawyer either at or shortly before the closing. Approximately 75 percent met with their lawyer 4 times or fewer, with a mean of 3.89 and a mode of 2 meetings.

The function of the lawyer who is still involved in representing home buyers has changed. In the pre-title insurance era, the primary function of the lawyer was to examine title, render an opinion thereon, and cure any discovered defects.⁶ Today, the lawyer's role with respect to title has greatly diminished.⁷ When asked, "What are the most important reasons you used a lawyer when buying your house?" only 13 percent said the lawyer was important to make sure title was good, and only 14 percent said an important function of the lawyer was to explain title insurance. The most commonly articulated reason for hiring a lawyer was "to protect me." The need for this protection is perceived to be the greatest in three situations: (1) for the first-time home buyer, (2) if one or more of the usual real estate service specialists is not involved in the transaction or (3) if there is concern that one or more of the service specialists or the seller is dishonest or unscrupulous.

Thus, when asked, "What type of person do you think needs a lawyer to help in buying a house?" typical answers included the following:

"Someone who doesn't trust their realtor."

5. Although 41% answered the question "Did you hire your own lawyer to help you purchase your house?" in the affirmative, a second question revealed that 9 of those 54 did not pay the lawyer any fee. Moreover, 2 of those 54 who answered affirmatively later said that they never met or spoke with their lawyer about the matter.

6. D. GAGL, *LAND TITLE ASSURING AGENCIES IN THE UNITED STATES* 41 (1937).

7. In a survey of State Bar Chairpersons, 25% reported that attorneys performed title searches in their jurisdiction. Patterson, *Residential Real Estate Practices*, [Fall 1987] BARRISTER 47. Even when lawyers are involved in the home purchase process on behalf of buyers, lawyer involvement with title is less than one might expect. Thus, in the Columbus survey, only 21 of the 54 purchasers who hired their own lawyer identified the lawyer as having assisted them with title matters. Almost an equal number said they relied on the title company.

"An inexperienced person. A first-time home buyer. Maybe someone not using a title company would need one. . . ."

"Someone who is buying a house from a builder or realtor who is not well known."

"Someone who doesn't trust the seller."

People who used lawyers generally seemed satisfied with them. Thus, 94 percent of those asked indicated they were satisfied with their lawyer and 89 percent said they would use a lawyer in a future home purchase transaction. The satisfaction rating for lawyers was higher than for any other group of real estate service specialists. The satisfaction rate for lenders was 81 percent, and for real estate agents, 89 percent. Those who used a lawyer, however, did not indicate that they were more satisfied with the purchase process overall than those who did not use a lawyer.

B. *Buyers Who Do Not Use Lawyers*

The Columbus survey revealed that many people do not perceive a great need for a lawyer in the home purchase transaction. The most frequently given reason for not hiring a lawyer is the expense. Thus, many survey respondents said they did not hire a lawyer because it cost too much. One respondent answered the question "What are the reasons you chose not to use a lawyer?" with "Wanted \$300 for one afternoon of work." Another said, "By the time you pay the down payment, you can't afford an attorney." Some respondents referred to the lawyer as simply "a waste of money."

A second reason frequently given is that some other person in the transaction performed the role of, or obviated the need for, a lawyer. Some of these substitutes are probably reliable. One respondent, for example, relied on his father-in-law, who was a lawyer. Other substitutes were not so reliable. For example, many people said they did not need a lawyer because they relied on the agent.⁸ While real estate agents are assumed to be knowledgeable professionals,⁹ buyers should be cautious in relying on agents because, legally, agents represent the seller and not the buyer.¹⁰ Still others said they did not need a lawyer because they relied on the title insurance company's lawyer, or even the seller's lawyer. Thus, one respondent stated:

[I did not use a lawyer] because I've owned houses before and gone through closings. I've used a lawyer before and did not see that anything he did was worth it. *Also, the Seller's attorney was at the closing and I felt that he would watch over everything's*

8. In the Columbus data, 9% of those who used lawyers said they relied on the real estate agent to assist with title matters. Twenty-one percent of those who did not use lawyers, however, said that they relied on the agent to assist with title matters.

9. See, e.g., Houston & Sudman, *Real Estate Agents As a Source of Information for Home Buyers*, 11 J. CONSUMER AFFAIRS 110, 119-20 (1977) (indicating that real estate agents usually have information concerning neighborhood characteristics that is as accurate as other "expert informants").

10. In both the United States and the United Kingdom, the real estate agent is the agent of the seller and not the buyer. Even if the buyer selects an agent herself, that agent is a sub-agent of the seller and is not the agent of the buyer. See *Frisell v. Newman*, 71 Wash. 2d 520, 429 P.2d 864 (1967); Currier, *Finding the Broker's Place in the Typical Residential Real Estate Transaction*, 33 U. FLA. L. REV. 655 (1981); Comment, *A Re-examination of the Real Estate Broker-Buyer-Seller Relationship*, 18 WAYNE L. REV. 1343 (1972). Approximately one-third of the buyers in the Columbus survey mistakenly thought the agent owed primary loyalty to them, and not to the seller.

legality. However, if I would buy a more expensive home, say \$250,000 to \$300,000, I would probably want a lawyer.¹¹

Similarly, many respondents said they did not need a lawyer because they relied on the builder from whom they bought. Thus, typical responses included "Any questions, we asked the builder's attorney," and "There is no need for a lawyer when the builder is involved with so many homes." These respondents did not indicate that they perceived that the builder's experience, compared with their relative inexperience, put them at a disadvantage. However, even on an otherwise level playing field, to rely on the builder/vendor or his lawyer as a source of legal information is a risky way to form expectations about legal relationships, given the obvious and apparent conflicts of interest that exist.¹²

III. WHY LAWYERS HAVE BEEN DISPLACED FROM THE UNITED STATES RESIDENTIAL REAL ESTATE MARKET

This section focuses on the process by which the lawyer's title opinion, and hence the lawyer, has been eliminated from the land-transfer process in many United States markets and replaced with a title insurance policy. No comparable development has occurred in the United Kingdom, where solicitors are retained by virtually all house buyers and sellers.¹³ Interviews with lawyers who practiced law in Columbus both before and after lawyers were displaced from the residential market indicate, without exception, that the cause of the displacement was the growth in popularity of title insurance.¹⁴

Before title insurance became common, purchasers needed lawyers to examine and pass on title, and, therefore, virtually all home purchasers were represented. Lawyers were consulted fairly early in the process, although not always before the contract was signed, and gave advice on a number of matters in addition to title. Although title assurance was the motivating reason for retaining the lawyer, once retained, buyers felt comfortable consulting their attorney about all matters related to the purchase. Typically, the attorney and client would meet a number of times and would spend at least one meeting going over the title opinion in detail.

A. *The Growth of Title Insurance*

The growth of title insurance in the United States is accounted for by three factors. First, it was early established by judicial decision that conveyancers and other real estate professionals were liable only for their negligence, and thus certain losses that fell on the purchasers of real estate could not be shifted to

11. Emphasis added.

12. As a group, the people who identified themselves as having purchased directly from the builder were as satisfied, or slightly more satisfied, with the purchase process than the general population. These people, however, were more likely to be involved in a dispute in connection with the purchase than the general population.

13. See, e.g., D. BURKE, *LAW OF TITLE INSURANCE* 2 (1986) ("Title insurance is an exclusively American invention.").

14. A series of personal interviews was conducted with long-time Columbus attorneys who identified themselves as real estate specialists, during the winter of 1989 and the spring of 1990. References in the remainder of this paper to the practice of residential real estate law in Columbus are based on those interviews.

the real estate professionals who had assisted them.¹⁵ In response to these decisions, the first title insurance company in the United States, the Real Estate Title Insurance Company, was formed in 1876.¹⁶ Title insurance provides coverage against hidden risks that lawyer's opinions do not. Thus, title insurance protects the purchaser against such defects as a forged, stolen or undelivered deed, while the lawyer's opinion will not. Moreover, title insurance companies provide this coverage at lower cost than lawyers, at least in some markets.¹⁷ This relative efficiency reflects the inferiority of the publicly maintained land records compared to the privately maintained "title plants" owned by the title companies.

The second reason for the growth of title insurance was the rapid development of the western United States at the end of World War II. During this period, the demand for development capital outpaced the locally available supply. The traditional sources of development capital were banks and savings and loans. These institutions typically invested the great bulk of their mortgage loan portfolio in mortgages secured by real estate in the locality in which the institution operated. Consequently, western developers could not look to eastern savings and loans for funds. "Life insurance companies, however, are national lenders, and the larger companies hold mortgages on lands located in all parts of the United States."¹⁸ Because the insurance companies were in need of title protection, it is not surprising that they readily accepted the idea of title insurance as the source of that protection. Moreover, life insurance companies are regulated by state laws that require that their real estate loans be secured by a first lien; title insurance provided an easy means of establishing regulatory compliance.

The third reason for the growth in popularity of title insurance is accounted for by the growth in size and importance of the secondary mortgage market.¹⁹ Briefly, the secondary mortgage market is a securities-like market, organized by the federal government, in which residential mortgages originated by local mortgage lenders are bundled into large packages, usually in excess of \$1 million, insured by the federal government, and then sold on a national market to private investors located all over the country and, increasingly, the world. The principal players in this market are three government-chartered secondary market corporations: The Federal National Mortgage Association (Fannie Mae), The Federal Home Loan Mortgage Corporation (Freddie Mac), and The

15. See, e.g., *Watson v. Muirhead*, 57 Pa. 161 (1868).

16. D. GAGE, *supra* note 6, at 80-82. Cf. D. BURKE, *supra* note 12 at 2, stating that the first title insurance company, the "Law Property Assurance and Trust Society," was formed in 1853, but that many attribute the advent of the industry to the decision in *Watson v. Muirhead*.

Title insurance is available in the United Kingdom, but the volume written is small, and there have been "novel" suggestions why it might play a useful part in conveyancing. See *Insurance in Aid of Conveyancing* (pts. 1 & 2), 100 SOLIC. J. 139, 100 SOLIC. J. 157 (1956).

17. See D. BURKE, *supra* note 13, at 14. Columbus attorneys report that under the pre-title insurance system of relying on abstracts, the attorney's title opinion could be produced more cheaply than title insurance. If the abstracts were not available, or had not been kept up to date, which is the current situation, then the cost of the lawyer's title opinion would be substantially more than title insurance.

18. Johnstone, *Title Insurance*, 66 YALE L.J. 492, 502-03 (1957).

19. Local attorneys attribute the rise of title insurance to the large-scale FHA insured housing developments constructed in the Columbus area during the 1950s and early 1960s. See also Johnstone, *supra* note 2, at 506-07 (the spread of title insurance is the result of the secondary mortgage market).

Government National Mortgage Association (Ginnie Mae). The purpose of the secondary market is two-fold: to smooth out cyclical periods of tight money, and to enable capital-rich regions of the country, to provide mortgage funds to areas of the country where demand exceeds local supply.²⁰ It has been estimated that 65 to 70 percent of all new mortgage loans each year are sold on the secondary market.²¹

The ability to participate in the secondary market is a great advantage to a lending institution. Participation enables the lender to increase liquidity, obtain a hedge against future inflation, and engage in the profitable mortgage servicing business. In order to participate in these markets, however, federal government regulations require title insurance.²²

B. *The Legal Profession's Reaction to Title Insurance*

Lawyers have reacted to the growth of title insurance in three ways. First, they have unsuccessfully fought in the courts to retain their role in the residential transfer process. The Arizona Supreme Court, for example, at the urging of the organized Bar Association, held that real estate agents and title companies who filled out form contracts, mortgages, and conveyancing instruments were engaged in the unauthorized practice of law.²³ The victory was short-lived, however, since an overwhelming majority of the people of Arizona soon passed a state constitutional amendment overriding the supreme court and restoring the rights of real estate agents and title companies to fill out forms.²⁴

Lawyers also responded by forming their own title insurance companies. These title companies were founded to permit lawyers to "compete more effectively with nonlawyer encroachments in real property law."²⁵ This reaction is not of much significance here, because although the lawyer who acts as an agent for a title company is preserving his economic interest in the residential real estate market, to the extent his function is that of a title agent he has ceased performing as a lawyer for the buyer in the transaction.

The third and most pervasive response of lawyers to the growth of title insurance has been to abandon the residential real estate practice to nonlawyers.²⁶ Even the American Bar Association approves of the diminishing role of the lawyer in residential real estate. "[I]t can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients [about real estate closings]."²⁷ Indeed,

20. A. AXLEROD, C. BERGER & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE, CASES AND MATERIALS* (3d ed. 1986) at 121-27.

21. Johnstone, *supra* note 2, at 515.

22. See, e.g., Housing and Urban Development, 24 C.F.R. § 221.563(a), 340.27 (1990).

23. *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 95-97, 366 P.2d 1, 14-15 (1961); *opinion on reh'g*, 91 Ariz. 293, 371 P.2d 1020 (1962).

24. Marks, *The Lawyers and the Realtors: Arizona's Experience*, 49 A.B.A.J. 139, 140-41 (1963).

25. *Bar-Related Title Insurance*, [Fall 1977] BARRISTER 51.

26. D. BURKE, *supra* note 13, at 12.

27. "... In the Spirit of Public Service:" *A Blueprint for the Rekindling of Lawyer Professionalism*, 1986. A.B.A. COMM ON PROFESSIONALISM 52 [hereinafter, "... In the Spirit of Public Service"].

"Lawyer resistance to such inroads [by title companies and real estate agents] for selfish reasons only brings discredit on the profession."²⁸

IV. IMPACT OF THE PRESENT STRUCTURE OF THE REAL ESTATE SERVICE SPECIALTIES ON CONSUMERS

The combined effect of market forces and government regulation of the secondary mortgage market has been greatly to promote title insurance and thereby reduce the prominence of the lawyer in the residential real estate transaction. In the remainder of this paper, We briefly describe two of the most important consequences this restructuring has had on the consumers of residential land transfer services.

A. *Buyers Are Not Well Informed*

In the Columbus survey, a number of questions were asked to determine how well informed purchasers were about the home-buying process. These questions were designed to determine the extent of knowledge about information that would be useful to the purchaser personally, rather than expertise that the purchaser could expect some other service specialist to possess and use on his behalf. The results of the survey indicate that many purchasers—in some cases more than one-half—don't know or are mistaken about matters of importance to them. Thus, approximately one-third of the sample did not know that the agent owed primary loyalty to the seller, not the buyer. In evaluating the agent's advice on matters, the agent's legal obligation to the seller should be relevant to the buyer.

Many purchasers were also uninformed concerning title matters. Thus, 50 percent did not know whether their deed was a general warranty deed, a limited warranty deed, a quit claim deed, or some other type. The type of deed has significance for the remedies that the buyer has against the seller in the event of a dispute concerning title. Although most people knew how they held title (joint tenancy was the most popular method indicated),²⁹ a significant percentage did not (22.6 percent). Moreover, of those who knew they were joint tenants, almost 50 percent did not know the significance of how they held title.³⁰ The significance of a joint tenancy is that the property automatically passes to the surviving joint tenant on the death of the other joint tenant. Awareness of this consequence is important for proper estate planning, since the joint tenancy takes priority over the tenant's last will.

Another area in which a significant number seemed uninformed had to do with title insurance. An overwhelming majority demonstrated that they did not understand the basics of coverage provided by the policy or the exceptions from

28. *Id.* Not surprisingly, the position of the ABA was controversial within the organized Bar. See Patterson, *supra* note 7, at 47.

29. Technically, there is no joint tenancy in Ohio. The Ohio survivorship tenancy is the equivalent of the joint tenancy and does not differ from it in any respect that is material to this discussion.

30. Indeed, 58% said they were not even asked how they wanted to hold title. The papers were simply prepared by the title company, presumably according to some custom.

coverage. Only 7 percent realized that there were any exceptions to their policy. Almost two-thirds of the Columbus respondents did not know that title insurance did not cover them if the house they bought was worth less than they paid, and more than half did not know that title insurance did not cover faulty construction, but did cover adverse legal claims to the house and land.

Buyer ignorance about title matters is probably explained by a combination of factors. For one thing, many purchasers (almost 40 percent) rely heavily on the title insurance companies to assist them with title matters. The interest of these companies in making their product seem valuable is inconsistent with advising buyers about the limitations on coverage contained in the policy. Second, the overwhelming majority of buyers were not given a copy of the title policy until at or after the closing. It is predictable that buyers would be unknowledgeable about a matter they had no opportunity to study. Finally, buyer ignorance in this area may be accounted for by the relatively small role that lawyers currently play as title advisers. Only 17 percent of those surveyed in Columbus said they relied on a lawyer to assist them with title matters.

B. *Many Buyers Have Unreliable Expectations*

Buyers rely on service specialists other than their own lawyers to provide them with the information needed to protect their interests and form expectations about their rights and liabilities in the home purchase process.³¹ In at least some situations, these expectations may turn out to be dangerously unreliable. For example, some buyers rely extensively on real estate agents to protect their interests without knowing that the agent's primary loyalty is to the seller, and not to the buyer.³²

Buyers also rely on their lenders for assurance concerning many aspects of the purchase transaction, including value of the property. Buyers tend to believe that their interests parallel those of their lenders, so that they can take a free ride on the lender's efforts in verifying the condition of title, value of the home, and similar matters. Although this reliance may be unjustified,³³ it is pervasive. Thus, when asked whether the respondent agreed or disagreed with the following statement, "Because my lender has so much money invested in my house, if the lender is satisfied with the house's condition, zoning value and title, my investment is in all likelihood, safe," 78 percent agreed.

Other responses emphasize the importance that buyers place on their lenders' opinion of value. Only 4.5 percent of the sample hired their own appraiser. The most important reasons identified by the sample for not hiring an appraiser were that it was not necessary (30 percent), that they themselves were sufficiently knowledgeable of value (25 percent), and that they relied on their lenders' appraisal (22 percent). Many answers combined more than one of these

31. See Note, *Mortgage Lender Liability to the Purchasers of New or Existing Homes*, 1988 U. ILL. L. REV. 191, 214-15.

32. See *supra* Part IV A. and note 10 and accompanying text. See also Houston & Sudman, *supra* note 9.

33. "Some home buyers do not retain their own counsel because they are willing to gamble that transaction approval by the lenders' lawyers sufficiently protects the buyers', generally similar, but in some respects quite different, interests." Johnstone, *supra* note 2, at 501.

themes. For example, one said, "We had a structural engineer to see if the house was in good condition. [It] conformed with other houses in the neighborhood. Once we were satisfied and the lender was satisfied, we didn't think an appraiser was necessary." Another said there was no need for an independent appraisal since you "end up paying the bank for an appraisal anyway."

Further measure of the extent of buyer reliance on lender opinion concerning value is found in responses to the hypothetical, "If your house had been appraised [by your lender] for less than the amount you agreed to pay for it, would you have done anything differently?" Seventy-one percent answered "yes." All but two said they would have gotten out of the deal or renegotiated the price. For example, one respondent said, "I would have offered only what the appraisal was. If turned down, I would have just kept on looking." Others said "I would've gone back to the seller and said it's not worth what you're trying to sell it for," and "I might have backed out. I put my trust in [the Veterans] Administration]."

In a sense, purchasers' expectations concerning value are reliable. To the extent that the purchase agreement contains a financing contingency (as 77 percent of the respondents said that their contract did), if the house is appraised for less than the purchase price, financing is unavailable and the buyer is excused from going ahead with the purchase. The 23 percent whose contracts were not contingent, however, would not be able to take advantage of a low appraisal to avoid their contract, and would either have to conclude their purchase or be liable for breach.

Even for the majority who can escape their contract if the lenders' appraisal is below purchase price, however, the protection of that appraisal may be more illusory than real. Realtors and appraisers report that appraisals are heavily influenced by the contract price. Fair market value is the amount that a willing buyer would pay a willing seller with neither of them under a compulsion to buy or sell and both of them reasonably well informed. From the appraiser's point of view, the most recent evidence of what a willing buyer would pay a willing seller would accept is the amount agreed upon in the contract between the parties. Thus, from the buyer's point of view, much of the protection of the appraisal is lost in its circularity. The buyer is relying on the appraiser for information about which the appraiser is relying on the buyer.

In other respects, too, these expectations are unreliable. First, there are many matters that affect the value of a house to a purchaser that do not materially affect its value as collateral to the lender. Assessments (such as for sewers) that are less than the down payment, restrictions on use, and minor encroachments are examples of such matters. Second, lenders' attorneys are typically more lenient in approving title than a buyer's attorney. A lender's attorney discounts the title risk to reflect the probability that the lender will ever become the owner of the property through foreclosure. This discount is high if the buyer is a good credit risk or the mortgage is to be sold on the secondary mortgage market. These factors do not reduce the risk to the buyer, however. If the title is bad, the buyer will pay the price for it when he tries to sell the property in the future. Third, if the bank is negligent in hiring the appraiser, or if the appraiser is negligent in making his inspection of the house, under the prevailing

view the buyer has no remedy against either the lender or the appraiser.³⁴ Particularly, this is the case with FHA and other government appraisals.³⁵ This is ironic, since many purchasers said they felt especially safe if an agency of the federal government was involved with the purchase.³⁶

V. SOME PRELIMINARY COMMENTS SUGGESTED BY THE DATA

At least three solutions to the problems created by the present structure of the real estate service specialties suggest themselves. One is to provide new ways for buyers to acquire information. This is the approach of some recent legislation. For example, the Real Estate Settlement Procedures Act (RESPA)³⁷ is premised on the idea that consumers need "greater and more timely information."³⁸ To that end, the Act requires uniform settlement statements as well as the distribution of booklets. It is unclear that RESPA has had positive results. Buyers are already signing so many papers before and at the closing that additional disclosures might be expected to have little effect. Further, many real estate service specialists think that the RESPA settlement statement is so unclear that they prepare their own form of statement and present it to the buyer in addition. It is not unusual at a single closing for a buyer to receive three settlement statements. Most lenders, and their attorneys, think RESPA has increased closing costs with little or no corresponding benefit.

Another approach to the problem of getting accurate information to the buyer is to require that buyers be represented by lawyers.³⁹ The same type of government regulations that effectively require title insurance could be adapted to this purpose. For example, the FHA might require certification that the buyer had been represented by counsel and certain matters explained to him as a condition of selling that buyer's mortgage on the secondary market. But attitudes of the public towards lawyers, market forces, and regulatory trends oppose such a move. The typical home purchase transaction *is* routine and lawyers probably are not needed.⁴⁰ The reintroduction of lawyers into the land transfer process would increase already high transaction costs. Most importantly, preliminary survey results indicate that increased lawyer involvement might not have any beneficial effect for the following reasons:

(1) Purchasers who use lawyers are no better informed than those who do not.

34. See, e.g., *Rice v. First Fed. Sav. & Loan Ass'n*, 207 So. 2d 22 (Fla. Dist. Ct. App. 1968).

35. In *United States v. Neustadt*, 366 U.S. 696 (1961), the Supreme Court stated that no duty was owed by the government's FHA appraiser to make careful appraisal for the purchaser's benefit.

36. For example, one respondent said he did not hire an independent appraiser because "The FHA appraiser was enough." Another said "I didn't even think about it. I put faith in the V[eterans] A[dministration] and my own judgment."

37. 12 U.S.C. §§ 2601-2617 (1989).

38. 12 U.S.C. §2601(a) (1989).

39. See Gresham, *The Residential Real Estate Transfer Process: A Functional Critique*, 23 EMORY L.J. 421 (1974) (considers how counsel can be helpful at various stages of the real estate transfer process).

40. "... *In the Spirit of Public Service*," *supra* note 27, at 52.

(2) Purchasers who use lawyers are no more satisfied with the purchase transaction. In fact, in the Columbus sample, the general satisfaction level of those who did not use a lawyer was greater than for those who did.⁴¹

(3) Purchasers who use lawyers are just as likely to find after signing the contract that it contains matters which had not been explained to them or which they did not expect. The following are some typical responses:

"A home warranty plan was not what I expected—it did not cover the kitchen appliances."

"Occupancy. That I was expected to let him live in the house rent free for 30 days."

"Taxes were 50 percent higher than I was told they would be."

"Seller put in contract that they didn't have to repair some things that I thought they would repair."

"Realtor's commission was higher than I had been told."

(4) Purchasers who used lawyers were no less likely to avoid disputes than those who did not.⁴² Thirty-eight percent of those represented by lawyers and 37 percent of those not represented by lawyers said they had been involved in some dispute during the process of purchasing their home. These disputes range from fairly trivial to substantial, from concerns about whether ornamental potted plants were included in the purchase to concerns about flooding, collapsing septic tanks, unsafe gas lines, condemned garages, and misrepresentations by the seller about the quality of the property.

Thus, it is not self-evident that the reintroduction of lawyers into the land transfer process as it has evolved would produce any beneficial results.

A third solution to the problem of buyers' being uninformed and having unreliable expectations is to change the law to bring it into line with buyer expectations. This sort of change is characteristic of the common law. Thus, Judge Skelly Wright stated in a slightly different context, "[C]ertain of the old rules of property . . . are inappropriate for today's transactions. In order to reach results more in accord with the legitimate expectations of the parties and the standards of the community, courts have been gradually introducing more modern precepts"⁴³ Indeed, there is some evidence that such an evolutionary change is in progress in the land transfer process.⁴⁴ Increasingly, courts seem ready to find land transfer service specialists, including lenders, appraisers, realtors and sellers liable for the disappointed expectations of buyers, even in the face of long-standing common-law rules to the contrary.

41. Eighty-four percent of those who did not use a lawyer expressed satisfaction, while 78% of those who did use a lawyer expressed satisfaction.

42. This observation may be the result of the reduced role that lawyers play in the typical transaction. Anecdotal evidence suggests that before title insurance became so commonplace, title insurance buyers were better informed by their lawyers than they are today. Nonetheless, preliminary survey results suggest that buyers who are represented by lawyers are no better off than buyers who are not.

43. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074-75 (D.C. Cir. 1970).

44. See, e.g., *Larsen v. United Fed. Sav. & Loan Ass'n.*, 300 N.W.2d 281 (Iowa 1981) (bank held liable in damages to home buyers who paid excessive price for home in reliance on negligent appraisal); *Jeminson v. Montgomery Real Estate & Co.*, 396 Mich. 106, 108, 240 N.W.2d 205, 206 (1976) (buyer has cause of action against bank which knew or should have known that vendor was notoriously deceptive and that sales transaction was fraudulent).

Title VII as Censorship: Hostile-Environment Harassment and the First Amendment

KINGSLEY R. BROWNE*

I. INTRODUCTION

"Women do not belong in the medical profession; they should stay home and make babies!" Is such a statement occurring in the workplace a constitutionally protected expression of a currently unfashionable social view, or is it sexual harassment in violation of Title VII of the Civil Rights Act of 1964? If it violates Title VII, is Title VII to that extent inconsistent with the first amendment? Many courts and commentators have addressed the first question—that is, the contours of "hostile environment" harassment—but few have acknowledged the possibility of constitutional protection for such statements.¹ The purpose of this Article is to examine the extent to which the broad definition of "hostile work environment" adopted by the courts in harassment cases establishes a content-based—even viewpoint-based—restriction of expression that is inconsistent with contemporary first amendment jurisprudence. To the extent that it does establish such a restriction Title VII must be given a narrowing construction in order to avoid a finding of invalidity.

Recent attention to the first amendment implications of racist and sexist speech has focused largely on attempts by colleges and universities to regulate such speech² and the application of general tort doctrine to such speech.³ It is not surprising that scholars have been particularly interested in regulation of speech in their own bailiwick. Yet the amount of attention paid university policies prohibiting racist and sexist speech seems out of proportion to their global importance since these policies seem to be the product of a temporary aberration that would burn itself out probably sooner than later even without any kind of legal intervention.⁴ Like the Indianapolis anti-pornography ordinance, regulation of offensive speech on campus probably generates far more expression than it regulates. Moreover, when legal intervention did occur, in the form of *Doe v.*

* ¹ Kingsley R. Browne, Associate Professor, Wayne State University Law School. I would like to thank John Dolan, Joseph Grano, Jessica Litman, Michael McIntyre, and Robert Sedler for our invaluable discussions and for their helpful comments on the manuscript.

1. Two very recent exceptions are Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990), and *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794 (M.D. Fla. 1991).

2. See *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); Post, *Free Speech and Religious, Racial, and Sexual Harassment: Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 267n.5 (1991) (citing 26 articles dealing with racist speech); Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484.

3. See Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123 (1990); Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

4. The subject of campus speech codes has begun receiving substantial, and primarily negative, attention in the popular press. See, e.g., *Upside Down in the Groves of Academe*, TIME, Apr. 1, 1991, at 66; Howe, *The Value of the Canon: What's Wrong with P.C.*, THE NEW REPUBLIC, Feb. 18, 1991, at 40; *A Simmering Stew of Grievances*, THE ECONOMIST, Feb. 16, 1991, at 21; *Taking Offense*, NEWSWEEK, Dec. 24, 1990, at 48; *The Academy's New Ayatollahs*, U.S. NEWS & WORLD REPORT, Dec. 10, 1990, Vol. 109 at 22.

*University of Michigan*⁵ and *American Booksellers Ass'n v. Hudnut*,⁶ the courts' responses were sure and decisive: the first amendment prohibits regulation of racist and sexist speech on the basis of the viewpoint expressed.

In contrast with the immediate rejection of regulation of campus speech and pornography that was deemed to convey a "wrongheaded" view about women, regulation of offensive speech in the workplace has been proceeding apace virtually without comment for well over a decade. Although it has resulted in suppression of a vast amount of expression, objections from the traditional defenders of free speech have not been forthcoming. An optimist might suggest that the concern over free speech in the academy is simply the opening skirmish in a broader battle to challenge regulation of offensive speech everywhere; the champions of the first amendment are simply attempting to get their own house in order before taking on the rest of the world. The indications are otherwise, however. Even the *Doe* court suggested that "speech which creates a hostile or abusive working environment on the basis of race or sex" is unprotected by the first amendment.⁷ It is difficult to avoid the conclusion that some who would protect the speech of students and faculty but not the speech of workers possess an elitist perspective that simply values the former group of speakers more than the latter. The lack of value of the speech of workers seems to be based upon one or more of the following opinions: (1) when workers speak they do not convey ideas; (2) ideas are not important to workers; (3) the ideas of workers are not important to us. These judgments can form no part of a first amendment jurisprudence.

Regulation of speech in the workplace that is deemed "harassing" is pervasive. The Guidelines of the Equal Employment Opportunity Commission provide the most commonly accepted definition of "sexual harassment," a definition that courts have adapted to fit cases of racial harassment as well: "verbal or physical conduct of a sexual nature [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."⁸ Although the Guidelines purport to regulate only "verbal or physical conduct," the concept of "verbal conduct" has no obvious meaning, and courts have consistently interpreted it to mean "verbal expression."⁹ Relying on the EEOC's definition of hostile-environment harassment, courts, both state and federal, have found employers liable for "conduct" ranging from clearly unprotected forcible sexual assault and other unwanted sexual touching to "obscene propositions," sexual vulgarity (including

5. 721 F. Supp. 852 (E.D. Mich. 1989) (striking down the University of Michigan offensive-speech policy).

6. 771 F.2d 323, 331 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (striking down the Indianapolis anti-pornography ordinance).

7. *Doe v. University of Michigan*, 721 F. Supp. 852, 863 (E.D. Mich. 1989). See also *infra*, note 193.

8. 29 C.F.R. § 1604.11(a)(3). Because the EEOC lacks the authority to promulgate substantive regulations, the Guidelines lack the force of law. However, federal courts, including the Supreme Court, have uniformly relied upon them, see, e.g., *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65 (1986), and many state statutes and regulations have adopted the EEOC language, see, e.g., ILL. REV. STAT. ch. 68, § 2-101(E); MICH. COMP. LAWS § 37.2103(h).

9. See *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 432 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (the term "verbal conduct of a sexual nature" . . . seems to be directed toward profane words and pictures that deal with sex").

"off color" jokes) and "sexist" remarks, some of which are almost certainly protected by the first amendment.¹⁰ Similarly, racial jokes, slurs, and other statements deemed derogatory to minorities have served as the basis for claims of racial harassment.

The restrictions on expression created by harassment regulation are not merely incidental; indeed, courts have recognized that the very purpose of the law is to "prevent . . . bigots from expressing their opinions in a way that abuses or offends their co-workers."¹¹ Moreover, protected expression¹² is often a substantial, if not the primary, basis for imposing liability. That is, the trier of fact is offended by the implicit or explicit message of the expression—for example, that women should be sexual playthings for men, that women (or blacks) do not belong in the workplace, or that they should hold an inferior position in our society. Yet, the right to express one's social views is generally considered to be at or near the core of the first amendment's protection of free expression.¹³

A broad definition of sexual and racial harassment necessarily delegates broad powers to courts to determine matters of taste¹⁴ and humor,¹⁵ and the vagueness of the definition of "harassment" leaves those subject to regulation without clear notice of what is permitted and what is forbidden. The incapable result is a substantial chilling effect on expression. Holding employers liable for the offensive speech of their employees exacerbates that chilling effect, because fear of litigation and liability creates a powerful incentive for employers—which in the private sector are not subject to the constraints of the first amendment—to censor the speech of their employees. Employers have responded to these incentives by substantially overregulating the speech of their employees.

Although with only one apparent exception¹⁶ no reported harassment decision has imposed liability solely on the basis of arguably protected expression, it does not follow that hostile-environment claims therefore pose little threat to first amendment rights. First, when protected expression is excluded from the

10. Most of the cases discussed in this Article involve claims brought under Title VII, 42 U.S.C. § 2000e. Others were brought under 42 U.S.C. § 1981 prior to the Supreme Court's rejection of harassment claims under that statute, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and others were brought under state anti-discrimination statutes. Because courts have tended to apply the standards of the EEOC Guidelines in cases brought under all of these statutes, the cases will be discussed without reference to the identity of the statute under which they were brought.

11. *Davis v. Monsanto Chemical Co.*, 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989). *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (quoting *Davis*, 858 F.2d 345).

12. The terms "protected expression" and "protected speech" are used in this Article because they are commonly used in the literature. There is, of course, no expression that is protected or unprotected under all circumstances. A political speech may be prohibited by regulations prohibiting noise in an intensive-care unit, and obscenity may not be prohibited by a law that distinguishes among obscene expressions based upon their political content. Thus, it may actually be more meaningful to speak in terms of "prohibited regulation" than in terms of "protected speech."

13. See *Pickering v. Board of Educ.* 391 U.S. 563, 573 (1968) (describing the "core value" of the first amendment as "[t]he public interest in having free and unhindered debate on matters of public importance").

14. See *State v. Human Rights Comm'n*, 178 Ill. App. 3d 1033, 1049, 534 N.E.2d 161, 171 (1989) ("Ultimately this is a case where the line between tastelessness and harassment is crossed.").

15. See *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 906 (1st Cir. 1988) ("Belittling comments about a person's ability to perform, on the basis of that person's sex, are not funny.").

16. *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794 (M.D. Fla. 1991).

liability calculus, the remaining unprotected expression or conduct, though of a harassing nature, may not be sufficiently severe or pervasive on its own to support a judgment. Second, even if sufficient unprotected conduct or expression is present so that a trier of fact *could* find against the defendant, a risk that liability may be imposed based in part on protected speech is intolerable under the first amendment.¹⁷ Third, under the doctrine of overbreadth, a legal scheme that reaches a substantial amount of protected speech cannot be applied to reach even unprotected expression.¹⁸ Therefore, evidence of protected speech should not be admitted at trial to support a claim of hostile environment.

The first amendment does not insulate all speech from legal regulation, but in order for speech to be regulated on the basis of content, it must fall within some recognized exception to the first amendment—such as defamation, obscenity, or “fighting words”—or a new exception must be recognized. Although some “harassing speech”¹⁹ falls neatly within existing exceptions, much does not, and the Title VII standard is sufficiently broad that it covers both protected and unprotected speech.

Part II of this Article discusses the theory of hostile-environment harassment as the courts have developed it under Title VII. Part III examines the viewpoint-based nature of the restrictions that have been imposed under Title VII. Part IV discusses the chilling effect that harassment regulation has on speech. Part V examines the extent to which the expression involved in those cases is protected under current first amendment doctrine. Part VI discusses whether first amendment doctrine should be modified to permit restriction of currently protected expression. Finally, Part VII discusses the appropriate scope of hostile-environment theory under first amendment doctrine properly understood.

II. THE THEORY OF HARASSMENT UNDER TITLE VII

Title VII expressly prohibits neither sexual nor racial harassment. Instead, it generally provides that it is an unlawful employment practice for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.”²⁰ Nonetheless, courts have identified two forms

17. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 921 (1982). In *Claiborne Hardware*, the Court struck down a judgment against the NAACP that had been based upon a boycott against certain white-owned businesses. The Mississippi Supreme Court had upheld the judgment on the ground that the boycott was effected in part by physical force and violence against potential customers. *Id.* at 895. The Supreme Court reversed, holding that the judgment was inconsistent with the first amendment because the boycott had been enforced by both unprotected force and protected persuasion. *Id.* at 922-23. According to the Court, “[t]he ambiguous findings of the Mississippi Supreme Court are inadequate to assure the ‘precision of regulation’ demanded by [the first amendment].” *Id.* at 921. Thus, according to the Court, a judgment that rests, or might rest, in part upon protected expression is invalid. As a result, the issue in a harassment case is not whether *all* of the expression forming the basis for the claim is protected; rather, the question is whether *any* of it is.

18. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

19. The term “harassing speech” is used to describe speech that courts have held to contribute to a finding of harassment under Title VII, without regard to whether the speech by itself would be actionable or whether the speaker intended to annoy the listener.

20. 42 U.S.C. § 2000e.

of sexual harassment that violate Title VII—"quid pro quo" and "hostile work environment" harassment. "Quid pro quo" harassment typically involves a claim that an employee, usually female, was required to submit to sexual advances as a condition of receiving job benefits or that her failure to submit to such advances resulted in a tangible job detriment, such as discharge or failure to receive a promotion.²¹ "Hostile work environment" harassment involves the claim that the workplace is so "polluted" with sexual hostility toward women—or racial hostility to other races—that it discriminatorily alters the "terms and conditions of employment" within the meaning of the statute.²² The hostility may be expressed either through conduct or through speech. The focus of this Article is limited to hostile-environment harassment and then only to the extent that the hostile environment is created in whole or in part by expression.²³

The first case to recognize a hostile-environment theory under Title VII was a race case. In *Rogers v. EEOC*, Judge Goldberg stated:

[E]mployees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and . . . the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.²⁴

Numerous cases since *Rogers* have relied upon this broad conception of the phrase "terms, conditions, or privileges of employment" to hold that a racially or sexually hostile atmosphere violates Title VII even absent any discrimination in wages, job assignments, or other tangible benefits, and *Rogers* was a major impulse behind the EEOC's promulgation of its Guidelines. In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court, in recognizing a cause of action for sexual harassment leading to non-economic injury, quoted the EEOC Guidelines approvingly, stating that in adopting those Guidelines, "the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."²⁵ The Court announced that "a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning

21. See, e.g., *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 603 (7th Cir. 1985); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1045 (3d Cir. 1977).

22. The distinction between the two kinds of harassment is not always clear, and some courts have criticized attempts to draw such distinctions. For example, in *Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986), the court, referring to a hostile environment, stated that "[t]he threat of loss of work explicit in the quid pro quo may only be implicit without being any less coercive."

23. A somewhat different form of hostile-environment claim is that consensual sexual relationships of other persons create an offensive sexually charged environment. In *Broderick v. Ruder*, 685 F. Supp. 1269, 1280 (D.D.C. 1988), the court held that the plaintiff proved a sexually hostile work environment by demonstrating the existence of pervasive consensual sexual conduct in the office. See also *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 862 (3d Cir. 1990) (acknowledging the theory, but rejecting the argument because there was no evidence that romantic relationships were "flaunted" or prevalent).

24. 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

25. 477 U.S. 57, 65 (1986). See also *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986) ("After *Meritor* there is no mistaking the acceptability of the EEOC definition (and verbiage) found at § 1604.11(a)").

and disconcerting as the harshest of racial epithets."²⁶ The Court emphasized, however, that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII."²⁷ Rather, for harassment to be actionable under Title VII, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"²⁸ The Court in *Vinson* had no trouble finding sufficient allegations of hostile environment, because the plaintiff alleged that she had been forcibly raped.

The reported cases reveal that the definitions of sexual and racial harassment under Title VII are at the same time broader and narrower than the conventional definition of "harassment," which generally connotes a pattern of conduct aimed at a particular person and intended to annoy. The statutory definition is broader in that expression can constitute "harassment" even when it is not directed toward the plaintiff²⁹ and not intended to annoy,³⁰ and narrower in that it includes only harassment based upon protected status and, even then, only harassment that is sufficiently severe or pervasive as to alter the terms and conditions of employment.³¹

Although some courts have stated that a plaintiff must show a "pattern of harassment," rather than "a few isolated incidents,"³² others have expressly rejected that distinction and suggested that the plaintiff "need not prove that the

26. 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

27. 477 U.S. at 67 (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII)), *cert. denied*, 406 U.S. 957 (1972); *Henson v. City of Dundee*, 682 F.2d at 904 (quoting *Rogers*, 454 F.2d 234).

28. 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d at 904). *See also* *Anderson v. Chicago Housing Authority*, 1988 U.S. Dist. LEXIS 14454, *20 (N.D. Ill. 1988) (rejecting claim based on "a few isolated incidents of sexual harassment" on ground that it was not enough to characterize workplace as "abusive working environment").

29. As the court explained in *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794, at 30-31 (M.D. Fla. 1991):

[I]ncidents involving other female employees place the conduct at issue in context. The pervasiveness of conduct constituting sexual harassment outside Robinson's presence works to rebut the assertion that the conduct of which Robinson complains is isolated or rare. Second, the issue in this case is the nature of the work environment. This environment is shaped by more than the face-to-face encounters between Robinson and male coworkers and supervisors. The perception that the work environment is hostile can be influenced by the treatment of other persons of a plaintiff's protected class, even if that treatment is learned second-hand.

See also *Waltman v. Int'l. Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) ("Although not all the graffiti was directed at Waltman, it is all relevant to her claim. . . . [e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive") (quoting *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985), *aff'd* 477 U.S. 57 (1986)).

30. *See* *Ellison v. Brady*, 924 F.2d 872, 879-80 (9th Cir. 1991) (adopting a "reasonable woman" standard that "classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment"); *Lynch v. Des Moines*, 454 N.W.2d 827 (Iowa 1990) (upholding claim of sexual harassment based on "sexually derogatory remarks, vulgar insults, and requests for sexual favors which the City attempts to portray as 'teasing' or 'joking' but which were demeaning and insulting to Lynch, whatever their purpose."); *Harris v. Int'l. Paper Co.*, 1991 U.S. Dist. Lexis 4340, * 17 (D. Maine 1991) ("state and federal laws prohibiting racial and sexual harassment are wholly uninterested in the perpetrator's intent").

31. *See supra* note 20 and accompanying text.

32. *See, e.g.,* *Gilbert v. Little Rock*, 722 F.2d 1390, 1394 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984).

instances of alleged harassment were related in either time or type,"³³ and others have suggested that it is error for a court to conclude that harassment did not exist simply because very few incidents were alleged.³⁴ Conduct need not be overtly sexual or racial to be actionable; other hostile conduct directed against the victim because of the victim's race or sex is also prohibited.³⁵

Ironically, though couched in terms of discriminatory treatment, the real claim in many harassment cases is that the work atmosphere did *not* change in response to the addition of women (or minorities) to the environment. The rationale is that conduct that appears harmless to men may be offensive to women, although such reasoning seems inconsistent, at least superficially, with the view that Title VII "rejects the notion of 'romantic paternalism' towards women."³⁶ For example, the court in *Andrews v. City of Philadelphia*³⁷ rejected the argument that the environment was not a hostile one because "a police station need not be run like a day care center," stating that neither should it have "the ambience of a nineteenth century military barracks,"³⁸ although an all-male police station having such an ambience would certainly not violate Title VII. The court also noted that although men might find the obscenity and pornography that pervaded the workplace "harmless and innocent," women might well "feel otherwise," and such expression may be "highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse."³⁹ As a conse-

33. *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989). See also *Waltman v. Int'l. Paper Co.*, 875 F.2d 468, 475 (5th Cir. 1989) ("focus is whether [plaintiff] was subjected to recurring acts of discrimination, not whether a given individual harassed [plaintiff] recurrently.").

34. *King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) ("although a single act can be enough, . . . generally repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident"); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989) ("the determination of whether the defendant's conduct is sufficiently 'severe or pervasive' to constitute racial harassment does not turn solely on the number of incidents alleged by plaintiff.").

35. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) ("The Supreme Court [in *Vinson*] in no way limited this concept to intimidation or ridicule of an explicitly sexual nature."); *Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497, 1503 (11th Cir. 1985) (holding that valid claim could be based on "threatening, bellicose, demeaning, hostile or offensive conduct by a supervisor in the workplace because of the sex of the victim"); *McKinney v. Dole*, 765 F.2d 1129, 1140 (D.C. Cir. 1985) (district court erred in assuming that incident of physical force could not constitute sexual harassment unless "explicitly sexual").

36. *United States v. City of Buffalo*, 457 F. Supp. 612, 629 (W.D.N.Y. 1978) (quoting *Rosen v. Public Serv. Elec. & Gas Co.*, 328 F. Supp. 454, 464 (D.C. N.J. 1990)). See also Note, *Sexual Harassment and Title VII: A Better Solution*, 30 B.C. L. REV. 1071 (1989) (arguing that sexual harassment is not really discrimination and urging enactment of separate sexual harassment legislation).

37. 895 F.2d 1469, 1486 (3d Cir. 1990).

38. *Id.* See also *Williams v. Atchison, T. & S.F. Ry.*, 627 F. Supp. 752, 755-56 n.2 (W.D. Mo. 1986) ("Whatever differences may exist between railroad workers and courthouse workers, it seems impermissible to exempt them from rules forbidding racial insults. Railroad workers doubtless know how to speak and behave in 'mixed company.' They must realize that under Title VII railroad workers are a 'mixed company.'") (emphasis in original).

39. See also *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) ("Conduct that many men consider unobjectionable may offend many women"); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 626 (1986) (Keith, J., dissenting in part) ("In my view, the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men.").

It is difficult to understand the decision of the District Court that was affirmed in *Bruhwiller v. University of Tenn.*, 859 F.2d 419 (1988), as animated by anything other than a sense of chivalry toward women. The District Court laid great weight on the fact that the alleged harasser had "cursed out" the plaintiff by saying, "What the hell is this goddamn noise about you and drug screens[?]" *Id.* at 423. As Judge Nelson stated in his dissent:

quence, a locker room atmosphere that was perfectly legal before the entry of women into the job becomes illegal thereafter.⁴⁰

The extent to which courts will be willing to pursue the above logic remains to be seen. Suppose, for example, an employer had a policy of imposing discipline against any employee who used profanity in front of a woman. The assumption that women as a group may be more offended by profanity than men as a group seems like just the sort of stereotype that Title VII was intended to erase. Just as it may be empirically true that women as a group are more offended by profanity than men, it also may be empirically true that women as a group are more nurturant than men,⁴¹ but courts have interpreted Title VII to prohibit reliance on the latter generalization,⁴² and it is unclear why the two generalizations should enjoy a different status.

Because harassment claims rest upon a discrimination theory, a number of courts have suggested that where sexual conduct is equally offensive to males and females there is no actionable harassment.⁴³ Similarly, where supervisors are abusive to all employees, many courts have rejected racial and sexual harassment claims.⁴⁴ Other courts have allowed such claims, however, where the harassment of the plaintiff took a sexual or racial form.⁴⁵ The latter cases seem inconsistent with the underlying theory of Title VII harassment, which is that

One can only conclude that Dr. Stafford's sin lay in his having forgotten that it was a lady he was talking to, and not a man. That may have been a breach of etiquette, even in this egalitarian and frequently profane age, but it was hardly evidence of a propensity to "discriminate against any individual . . . because of such individual's . . . sex."

Id. (Nelson, J., dissenting).

40. See *Williams-Hill v. Donovan*, 1987 U.S. Dist. LEXIS 13,992, *4-5 (M.D. Fla. 1987) (when plaintiff began working in the office she encountered an atmosphere in which male employees "spen[t] a good portion of the day telling each other racist, sexist and ethnic jokes"; she complained to her supervisor who announced that the joking would have to stop but even then it did not stop).

41. See *Browne, Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 Sw. L.J. 617, 623-24 (1984).

42. See *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (even if basic psychological differences between men and women make women as a class superior flight attendants, Title VII precludes reliance on that fact in making employment decisions), *cert. denied*, 404 U.S. 950 (1971).

43. See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) ("instances of complained of sexual conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge"); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982); *Bennett v. Corroon & Black Corp.*, 517 So. 2d 1245, 1247 (La. App. 1987). *But see* *Broderick v. Ruder*, 685 F. Supp. 1269, 1275 n.6 (D.D.C. 1988) (in finding that hostile work environment existed, court relied on testimony from male employee that the sexual atmosphere offended him).

44. See, e.g., *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 105 (2d Cir. 1988) (although plaintiff proved that her supervisor was abusive, "the record showed that his temper was manifested indiscriminately toward men and women, even his superiors."); *Gilliam v. Omaha*, 524 F.2d 1013, 1016 (8th Cir. 1975) (supervisor "apparently subjected all of his employees, at one time or another, to abusive language and discipline."); *Bradford v. Sloan Paper Co.*, 383 F. Supp. 1157, 1161 (N.D. Ala. 1974) (although manager's actions were indefensible, they did not reflect racial bias because the manager offended equally members of all races).

45. See *Bailey v. Binyon*, 583 F. Supp. 923, 927 (N.D. Ill. 1984) (rejecting defendant's argument that they could not be liable to black plaintiff for racial slurs "if they also used derogatory ethnic epithets in addressing, for example, Irish, Italian, and Jewish employees."); *Zabkovicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984) (rejecting defendant's contention that harassment was the result of a personality clash and that a male would have suffered equally brutal harassment, though of a different form, stating: "the sexually offensive conduct and language used would have been almost irrelevant and would have failed entirely in its crude purpose had the plaintiff been a man"); *Lynch v. Des Moines*, 454 N.W.2d 827, 834 (Iowa 1990) (although "verbal abuse with sexually-charged language was not reserved only for women at the Des Moines Police Department . . . [m]any of the insulting comments aimed at Lynch were particularly reserved for women.").

the employee suffers an adverse working environment because of race or sex. A supervisor who refers to subordinates by terms such as "dumb bastard," "dumb bitch," "fat bastard," "red-headed bastard," and "black bastard" cannot fairly be said to have discriminated against the woman and the black in favor of the fat, dumb, and red-headed employees.⁴⁶ All were subjected to an abusive environment, and unless the black and the woman would have been spared the abuse but for their race and sex, they are not victims of discrimination. By similar reasoning, when harassment is directed against an individual because of a personal grudge, it should not be actionable even if it takes a racial or sexual form, though the cases come out the other way.⁴⁷ Conversely, of course, where the harassment does not take a sexual or racial form but is aimed at the victim because of the victim's race or sex, harassment on the prohibited basis exists.

The Supreme Court has not yet wholly defined the extent of an employer's liability for harassment by its employees. In *quid pro quo* cases, which by definition involve supervisory employees, courts generally apply automatic vicarious liability on the theory that such behavior is like any other form of prohibited discrimination, where the employer is liable irrespective of whether it knew of the particular discriminatory conduct by one of its agents or had a policy against it.⁴⁸ The scope of employer liability for hostile-environment harassment is not as well settled and may depend upon whether the harasser is a supervisor or a co-worker. Although the EEOC Guidelines provide that an employer is automatically liable in all cases of sexual harassment,⁴⁹ the Supreme Court in *Vinson* rejected that standard.⁵⁰ The Court declined, however, to articulate any standard in its place, although it did suggest that courts should look to general agency principles and consider the following factors: (1) whether the employer has a policy prohibiting sexual harassment; (2) whether the policy was communicated to employees; (3) whether the employer had notice of the harassment; and (4) whether the employer's response upon learning of the harassment was adequate.⁵¹ However, the Court noted that "absence of notice to an employer does not necessarily insulate that employer from liability."⁵² Courts since *Vin-*

46. *But see* *Bailey v. Binyon*, 583 F. Supp. 923, 927 (N.D. Ill. 1984) ("The use of the word 'nigger' automatically separates the person addressed from every non-black person; this is discrimination *per se*.").

47. For example, in *Arnold v. City of Seminole*, 614 F. Supp. 853 (E.D. Okla. 1985), the plaintiff complained of harassment, only some of which was of a sexual nature. Explicit pictures were posted with plaintiff's name on them, someone wrote "the wicked witch is gone" on the calendar when she took vacation, someone tried to set her up on a phony drug-buying charge, and she was repeatedly told that women did not belong on the police force. *Id.* at 856-65. Although the hostility toward plaintiff may well have been motivated by her sex, the court's findings indicated that the leading harasser knew her before she started work, and when she began work he indicated that he hated her. *Id.* at 858. The court addressed the harassment claim, finding in her favor, without addressing the motivation for the harassment. *Id.* at 869.

48. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 n.22 (11th Cir. 1987); *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 605 (7th Cir. 1985); *Katz v. Dole*, 709 F.2d 251, 256 n.6 (4th Cir. 1983); *McCalla v. Ellis*, 180 Mich. App. 372, 379-80, 446 N.W.2d 904, 909 (1989).

49. 29 C.F.R. § 1604.11(c).

50. 477 U.S. 59, 72 (1986).

51. *Id.* at 71-72.

52. *Id.* at 72.

son are split on whether notice is required in supervisor cases,⁵³ but in cases involving co-workers most courts have required that the plaintiff show that the employer knew or should have known of the harassment and failed to take adequate remedial steps.⁵⁴ There is no need, however, for the employee to show that the failure of the employer to remedy the situation was discriminatory.⁵⁴ An employer that routinely tells employees to work out their problems with their co-workers is liable for harassment if it applies the same rule to complaints of harassment.⁵⁶

Reported decisions under Title VII have found a wide variety of speech to constitute or contribute to a sexually or racially hostile working environment. In many of the cases discussed below, additional facts contributed to the decision. The point of the illustrations is not that only protected expression was involved or that the ultimate conclusions by the courts were necessarily wrong.⁵⁷ Rather, the examples show that pure expression plays a large role in many of the decisions, a conclusion having substantial first amendment implications.⁵⁸

53. Compare *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1515 (11th Cir. 1989) (employer liable for hostile environment created by supervisor even without notice); *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination*, 400 Mass. 156, 508 N.E.2d 587 (1987) (same) (Massachusetts law); *Board of Directors Green Hills Country Club v. Illinois Human Rights Comm'n*, 162 Ill. App. 3d 216, 514 N.E.2d 1227 (1987) (same) (Illinois law), with *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 902 (1st Cir. 1988) (employer liable for supervisory harassment if it had actual or constructive notice of the harassment and failed to take appropriate steps to halt it); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) (same).

54. *Lipsett* at 902 (1st Cir. 1988); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988).

55. Cf. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) (holding that union is liable for discriminatory processing of grievances if it took grievances raising claims of discrimination less seriously than other grievances).

56. See *Erebia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250, 1261 (6th Cir. 1985) (Kennedy, J., dissenting) ("Here the employer's actions are fully consistent with the inference that Erebia's supervisors merely expected their foreman to handle a problem with his subordinates by himself."), *cert. denied*, 475 U.S. 1015 (1986).

57. On the contrary, some of the reported cases describe what can only be considered egregious examples of harassment. Consider for example, the plaintiffs' experience in *Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988):

Immediately after the women started work, male members of the construction crew began to inflict verbal sexual abuse on the women. The men incessantly referred to the women as "fucking flag girls." The men nicknamed Ms. Ticknor "Herpes" after she developed a skin reaction due to a sun allergy. On one occasion, Ms. Baxter returned to her car and found the name "Cavern Cunt" written in the dust on the driver's side, and "Blond Bitch" written on the passenger side where Ms. Hall sat. Male crew members repeatedly asked Ms. Hall if she "wanted to fuck" and requested that Ms. Hall and Ms. Baxter engage in oral sex with them. . . .

In addition to the verbal abuse, male coworkers subjected Ms. Hall and Ms. Baxter to offensive and unwelcomed physical touching. Male crew members would corner the women between two trucks, reach out of the windows and rub their hands down the women's thighs. They grabbed Ms. Hall's breasts. One crew member picked up Ms. Hall and held her up to the cab window so other men could touch her. [A supervisor] observed this incident but did nothing.

All three women also experienced other types of abuse at work. Male crew members frequently pulled down their pants and "mooned" the women while they were working. One crew member exposed himself to Ms. Hall. Male crew members flashed obscene pictures of naked couples engaged in oral intercourse at the women. A male crew member urinated in Ms. Hall's water bottle. Several men urinated in the gas tank of Ms. Ticknor's car, causing it to malfunction. . . . Male crew members would refuse to give the women a truck to take to town for bathroom breaks. When the women would relieve themselves in the ditch, male crew members observed them through surveying equipment.

Id. at 1012.

58. This Article does not address at any length the first amendment implications of using protected statements as evidence of discriminatory purpose for an employment decision such as a discharge or refusal to promote. See *Carter v. Sedgwick Co.*, 705 F. Supp. 1474 (D. Kan. 1988); *Jordan v. Wilson*, 649 F. Supp. 1038, 1058 (M.D. Ala. 1986) (in finding for plaintiff class in sex discrimination action against police department, court relied

III. TITLE VII AS A VIEWPOINT-BASED RESTRICTION ON EXPRESSION

Expression contributing to harassment claims comes in a variety of forms. While much of it is exceedingly crude and probably outside the protection of the first amendment, some is merely uncivil, some at most insensitive, and some perhaps wholly harmless. As the description of the cases below reveals, speech that is only arguably sexist, sexual, or racist may form the basis for a claim of harassment. Central to a finding of unlawful harassment is often a conclusion by the court that the message is "offensive," "inappropriate," or even "morally wrong." Even if the employer ultimately prevails in such cases, it must incur a high cost in litigation fees for declining to regulate the speech of employees. Because the underlying objection to sexist or sexual speech and to racist speech is sometimes different, the two forms of harassment will be considered separately.⁵⁹

A. *Sexual Harassment*

There are two primary messages conveyed by the expression that leads to sexual harassment complaints. The first is a message of unwelcomeness or hostility; expressions that women do not belong in the workplace or scornful or derisive statements about women would fall in this class. The second is a message that the harasser views the plaintiff in particular or women in general in a sexual light. For sake of discussion, the former will be called the "hostility message," while the latter will be called the "sexuality message."⁶⁰

in part on expressions of "sexually-biased attitudes" by male supervisors, which, even if made in a joking manner, revealed the "true feelings and attitudes of department officials").

59. Under Title VII, harassment on the basis of any characteristic protected by the statute—race, color, national origin, sex, or religion—is prohibited. Most of the cases involve race or sex. Harassment on the basis of national origin or religion is largely equivalent to discrimination based upon race; that is, the message is generally one of hostility. See *Weiss v. United States*, 595 F. Supp. 1050, 1053 (E.D. Va. 1984) (plaintiff referred to as "resident Jew," "rich Jew," "Jew faggot," and "Christ Killer"); *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627 (Iowa 1990) (supervisor called plaintiff a "goddamn stupid fuckin' Catholic" and made other derogatory remarks about Catholics being stupid and having a lot of children).

One recent case presents a different twist on religious harassment, with obvious first amendment implications. In *Brown Transp. Corp. v. Pennsylvania Human Relations Comm'n*, 578 A.2d 555 (Pa. 1990), a Jewish employee claimed that his employer engaged in religious harassment by including Bible verses on the face of its paychecks and circulating a company newsletter containing articles with religious content. Apparently, the message of the articles was a Christian one, not an anti-Jewish one, and the Commission found that neither the verses on the paychecks nor the newsletter articles hindered the employee's job performance. Nonetheless, the court upheld a finding of harassment by an administrative law judge, suggesting that the employer was obligated to remove the religious messages from the employee's paycheck and his copy of the newsletter. 578 A.2d at 562.

60. I understand that some may argue that these are two sides of the same coin. That is, both are based on a particular view of "woman's place" as being "in the bedroom not the boardroom"—a rejection of women as men's equals. The merits of that position are not central to the thesis here—that hostile-environment regulation is a restriction of free expression—instead, that debate goes only to the question whether one message is being suppressed or two. Suffice it to say that it is far from clear that sexuality implies a lack of respect. Put another way, there is no necessary contradiction in viewing one's colleague (or even one's subordinate) simultaneously as an attractive sexual being and a competent co-worker. Indeed, the societal ideal for marriage is that the parties to the marriage view each other as intellectual equals, as autonomous persons, and as desirable romantic partners. Acceptance of the suggestion that a relationship can be based on either mutual respect or lust, but not both, would not bode well for the future of marriage in our society.

Many sexual harassment cases have involved the use of "bad words" of a sexual nature. Crude or otherwise inappropriate language referring to or addressing women is commonly present in hostile-environment cases, though it is not generally by itself enough to establish a claim of harassment. The terms complained of are primarily of two kinds, and they convey both of the above-described messages: (1) the "hostility message" is conveyed by terms of derision, such as "broad," "bitch," and "cunt,"⁶¹ and (2) the "sexuality message" is conveyed by terms of "endearment," such as "honey,"⁶² "sweetie,"⁶³ and "tiger."⁶⁴ The complained-of terms may refer to women in general,⁶⁵ particular women other than the plaintiff,⁶⁶ or they may refer to the plaintiff herself and be addressed either to her⁶⁷ or to others while referring to her.⁶⁸

At least with respect to the most vulgar expressions, arguably it is just the use of "indecent" words—words that are "beyond the pale" of what can be spoken in polite society—that is being regulated. That, of course, would justify viewing the most vulgar terms as contributing to a hostile environment, but it would not justify reliance on milder terms, such as "broad." But Title VII is not a "clean language act,"⁶⁹ and bad language conveying no idea is not the target

61. Some words, primarily those relating to female sexual anatomy, may actually convey a dual message by showing contempt for women by equating them with their sex organs.

62. *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794, at *27 (M.D. Fla. 1991).

63. See Walsh, *Confronting Sexual Harassment at Work*, *Washington Post*, July 21, 1986, Washington Business, at 1, col. 2 (Statement of Claudia Withers, director of employment programs at the Women's Legal Defense Fund) ("when women perceive that things like 'honey' and 'sweetie' make them uncomfortable on the job, it's against the law") (quoted in Strauss, *supra* note 1, at 9 n.29).

64. See, e.g., *Volk v. Coler*, 845 F.2d 1422, 1426-27 (7th Cir. 1988).

65. See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 615 (6th Cir. 1986) (supervisor of company, but not supervisor of plaintiff, "customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff"), *cert. denied*, 481 U.S. 1041 (1987). See also *id.* at 624 (Keith, J., dissenting) (supervisor routinely referred to women as "whores," "cunt," "pussy," and "tits").

66. For example, *State v. Human Rights Comm'n*, 178 Ill. App. 3d 1033, 534 N.E.2d 161 (1989), affirmed a finding of sexual harassment based on the plaintiff's testimony that her supervisor would describe women he liked in terms of their physical appearance and women he did not like he would refer to in "sexually derogatory" terms. *Id.* at 164.

[The plaintiff] testified . . . :

If he met a [woman] that he was fond of, or that he liked, he would describe her in terms of physical appearance. For instance, he would say she had big boobs, she had a nice round ass that was good for pushing, I like her legs, she had a sensuous mouth, I like her doe eyes. If he was involved or had contact with a woman that he did not like, he would refer to her being on the rag, or raggin', or he would call her a bitch, a cunt or a twat.

178 Ill. App. 3d at 1037, 534 N.E.2d at 163-64. See also *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1472, 1485 (3d Cir. 1990) ("women regularly were referred to in an offensive and obscene manner"); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 888 (1st Cir. 1988) (plaintiff complained that male residents "rated" women in front of her on the basis of physical attributes and sexual desirability).

67. In *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), both male and female supervisors made crude and disparaging remarks about the charging party's pregnancy. A male supervisor stated that "that's what you get for sleeping without your underwear." *Id.* at 1507. A female supervisor told her that she did not like "stupid women who have kids," and on many occasions called her a "dog," a "whore," and a "slut." *Id.* See also *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 270 (N.D. Ind. 1985) ("[r]egular, almost daily exposure to terms such as 'stupid cunt,' 'whore,' [and] 'bitch'"); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) ("pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment.").

68. See, e.g., *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (coworkers used derogatory references to female construction workers).

69. *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983).

of the harassment cases. Thus, the court in *State v. Human Rights Commission*,⁷⁰ distinguished between "gender-specific" terms, such as "cunt," "bitch," "twat," and "raggin' it"—which constitute "conduct of a sexual nature"—and "general sexual" terms, such as "fuck" and "motherfucker" used as expletives, which do not. The court held that a supervisor's reference to women's physical appearance and his reference to women by "gender-specific" derogatory terms constituted sexual harassment because it was an "expression of animosity" toward women.⁷¹ The finding of harassment was not based primarily on one-to-one expressions of hostility by the supervisor toward the employee,⁷² but instead on the general disrespect he showed women in his conversations with others.⁷³

More explicit expressions of "Neanderthal" attitudes toward women have also been held to support a claim of hostile environment. Thus, in *Lipsett v. University of Puerto Rico*,⁷⁴ a female medical resident claimed that one of her fellow residents told her that women should not become surgeons "because they need too much time to bathe, to go to the bathroom, to apply makeup, and to get dressed," and she frequently heard other comments to the effect that women did not belong in surgery.⁷⁵ Although these statements were "not explicitly sexual," the court concluded that they were "charged with anti-female animus" because they "challenged their capacity as women to be surgeons" and "questioned the legitimacy of their being in the Program at all."⁷⁶ As a result, they could contribute to the hostile environment.⁷⁷ Rejecting the defendant's argument that many of the comments were jokes, the court observed that "[b]elittling comments about a person's ability to perform, on the basis of that person's sex, are not funny."⁷⁸

Plaintiffs in sexual harassment cases also frequently challenge the exhibition of written or pictorial material that they believe is demeaning or mocking toward women. Pin-ups or "girlie magazines" in the workplace have been the subject of innumerable sexual harassment claims.⁷⁹ The conflicting approaches

70. 178 Ill. App. 3d 1033, 1046, 534 N.E.2d 161, 170 (1989).

71. *Id.* at 1049, 534 N.E.2d at 171. Comments similar to those in this case were not considered enough to create a hostile environment by the court in *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

72. Some of the one-to-one expressions of hostility from the supervisor to the employee are hard even to consider "sexual": "motherfucking son of a bitch, the day was perfectly fine until you in your usual incessant perverse nagging tone started in on me." 178 Ill. App. 3d at 1040, 534 N.E.2d at 165.

73. The plaintiff in *Anderson v. Chicago Housing Auth.*, 1988 U.S. Dist. LEXIS 14,454 (N.D. Ill. 1988), relied in part on "disparaging and sexist remarks" referring to female employees as "menopausal" or "going through the change," but the court held that the statements, "while offensive, do not rise to the level of sexual harassment." *Id.* at *18-19.

74. 864 F.2d 881 (1st Cir. 1988).

75. *Id.* at 887. Another supervisory resident justified his assigning plaintiff menial tasks by asserting that women should not be surgeons because they could not be relied upon while they were menstruating or, as he put it, "in heat." *Id.* See also *Arnold v. City of Seminole*, 614 F. Supp. 853, 862-63 (N.D. Okla. 1985) (comments that women are not fit to become police officers; picture of a nude woman posted on a locker door with words "Do women make good cops—No - No - No.")).

76. 864 F.2d at 905 (emphasis in original).

77. See also *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794, at *28 (M.D. Fla. 1991) (coworker made statements such as "there is nothing worse than having to work around women").

78. *Id.* at 906.

79. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1472 (3d Cir. 1990) ("pornographic" pictures of women were displayed in the locker room on the inside of a locker that was generally kept open); *Waltman v. Interna-*

to the problem of sexually oriented displays are revealed by the majority and dissenting opinions in *Rabidue v. Osceola Refining Co.*⁸⁰ The majority rejected a claim that was based upon anti-female language and pin-ups, stating:

The sexually oriented poster displays had a *de minimis* effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places.⁸¹

On the other hand, Judge Keith's frequently cited dissent would have found that the alleged harasser's "misogynous language" combined with the pin-ups constituted a Title VII violation because they "evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy."⁸² In the dissent's view, the "precise purpose" of Title VII was to prevent sexual jokes, conversations, and literature from "poisoning the work environment."⁸³ Two of the displays that Judge Keith seemed to find particularly reprehensible were a poster showing a woman in a supine position with a golf ball on her breasts and a man standing over her, golf club in hand, yelling "Fore"⁸⁴ and a supervisor's desk plaque declaring "Even male chauvinist pigs need love."⁸⁵

tional Paper Co., 875 F.2d 468, 471 (5th Cir. 1989) (sexually oriented calendars on walls and in lockers); *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 105 (5th Cir. 1988) (presence of "obscene cartoons" bearing plaintiff's name), *cert. denied*, 489 U.S. 1020 (1989); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988) (*Playboy* centerfolds displayed by male residents in rest facility); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Sanchez v. City of Miami Beach*, 720 F. Supp. 974, 977 n.9 (S.D. Fla. 1989) ("various pictures from *Playboy*, *Penthouse*, and other publications were posted in the station."); *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794 (M.D. Fla. 1991) ("allegation that the pervasive presence of pornography in the workplace is offensive to female employees generally and plaintiff in particular."); *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569 (W.D.N.Y. 1987) (presence of "pornographic" magazines and sexually oriented pictures and calendars); *Brown v. City of Guthrie*, 1980 WL 380, *3 (W.D. Okla. 1980) (presence of magazines containing photographs of nude women in police dispatcher's desk for policemen to look at during their spare time).

80. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

81. *Id.* at 622.

82. *Id.* at 627 (Keith, J., dissenting). See also *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 905 (1st Cir. 1988) (quoting language from *Rabidue* dissent); *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569, 573 (W.D.N.Y. 1987) (explicitly rejecting *Rabidue* majority opinion and adopting position of *Rabidue* dissent that "sexual posters and anti-female language can seriously affect the psychological well-being of the reasonable woman and interfere with her ability to perform her job," *id.* at 573 n.2 (quoting *Rabidue*, 805 F.2d at 627 (Keith, J., dissenting))), and may "create an atmosphere in which women are viewed as men's sexual playthings," *Barbetta*, 669 F. Supp. at 573; *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794 (M.D. Fla. 1988) ("To the extent that *Rabidue* holds that some forms of abusive, anti-female behavior must be tolerated in the work environment because that behavior is prominent in society at large, the case conflicts with the established law in this Circuit") (citation omitted).

83. 805 F.2d at 626.

84. In *Carter v. Sedgwick County*, 705 F. Supp. 1474, 1476 (D. Kan. 1988), a sexual harassment claim was based in part on the presentation to plaintiff of several "sexual novelties," including a "Mr. Peter Party Mold," a "Pecker Pop Top," a "Mouth Organ," a "Sexy Hotdog," and nude male and female figurines. The alleged harasser's wife testified that these objects were joint gifts from her and her husband that were given as jokes that they thought that plaintiff would enjoy.

See also *Jones v. Flagship Int'l*, 793 F.2d 714, 717 (5th Cir. 1986) (unsuccessful sexual harassment claim based in part on presence of "figures of bare-breasted mermaids as table decorations"), *cert. denied*, 479 U.S. 1065 (1987).

85. *Rabidue v. Osceola Ref. Co.*, 805 F.2d at 624 (Keith, J., dissenting). See also *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794, at 112-13 (M.D. Fla. 1991) (Title VII prohibits speech that is "disproportionately more offensive or demeaning to one sex . . . because it conveys the message that they do not

The message restricted by exclusion of pin-ups is the "sexuality message." Kathryn Abrams describes that message as follows:

Pornography on an employer's wall or desk communicates a message about the way he views women, a view strikingly at odds with the way women wish to be viewed in the workplace. Depending on the material in question, it may communicate that women should be objects of sexual aggression, that they are submissive slaves to male desires, or that their most salient and desirable attributes are sexual. Any of these images may communicate to male coworkers that it is acceptable to view women in a predominantly sexual way.⁸⁶

The very recent case of *Robinson v. Jacksonville Shipyards, Inc.*,⁸⁷ which adopted the view of both the *Rabidue* dissent and the Abrams article, was apparently the first reported decision to impose liability for sexual harassment based entirely on the pervasive presence of sexually oriented magazines, pin-up pictures—such as *Playboy* foldouts and tool-company calendars—and "sexually demeaning remarks and jokes" by male coworkers; the plaintiff complained of neither physical assaults nor sexual propositions.⁸⁸ Some of the pictures were posted on walls in public view, but included within the category of sexually harassing behavior were incidents where male employees were simply reading the offending magazines in the workplace⁸⁹ or carrying them in their back pockets.⁹⁰ The court rejected the suggestion of *Rabidue* that sexually oriented pictures and comments standing alone cannot form the basis for Title VII liability, stating that "[e]xcluding some forms of offensive conduct as a matter of law is not consistent with the factually oriented approach" required by Title VII.⁹¹

A desire not to be viewed as a "sex object" also underlies the objection to sexual propositions in the workplace. Sexual harassment cases have often involved sexual propositions of varying degrees of vulgarity.⁹² For example, in *Continental Can Co. v. State*,⁹³ an employee's coworkers told her how they could "make her feel sexually" and that they could make her want to leave her husband.⁹⁴ In another case, male workers told dirty jokes, suggested that plain-

belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment").

86. Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1212 n.118 (1989). See also *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. Lexis 794, at 123-24 (M.D. Fla. 1991) (quoting same).

Abrams' categorical assertion that the message of pornography is "strikingly at odds with the way women wish to be viewed in the workplace" seems overbroad and based not on an empirical judgment that all women object to being viewed in a sexual manner in the workplace, but rather on the normative judgment that women *should* object. Moreover, not all women object to pornographic materials, even in the workplace, and many who do object do so on grounds having nothing to do with views of "sexual subordination."

87. 1991 U.S. Dist. LEXIS 794 (M.D. Fla. 1991).

88. *Id.* at 90.

89. *Id.* at 18, 25.

90. *Id.* at 37.

91. *Id.* at 120-23. The court also examined, albeit superficially, the argument that the first amendment imposes limits on the kind of activity that can be the subject of sexual harassment claims. *Id.* at 154-62.

92. Indeed, the Ninth Circuit has expressed the view that even "well-intentioned compliments" can form the basis for sexual harassment claims. *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991).

93. 297 N.W.2d 241, 245 (Minn. 1980).

94. *Id.* at 245. One coworker told her that "he wished slavery days would return so that he could sexually train her and she would be his bitch." *Id.* at 246. Coworkers also told her that women who worked at factories were "tramps." *Id.*

tiff participate in a sexually explicit home video, and one worker suggested that she "sit on [his] face."⁹⁵ In yet another, the plaintiff alleged that the message, "How about a little head?" appeared on the screen of her computer terminal.⁹⁶ Although sometimes the advances are crude and explicit, that is not always the case. For example, in *Zowayyed v. Lowen Co.*, the plaintiff alleged that the company president wrote a note to her reading, "You have very playful eyes. Do you play?" and the next day said to her, "If you don't bait the hook, you can't catch the fish."⁹⁷ Sometimes the assertion goes beyond what the alleged harasser has said to what the harasser is thinking. Thus, plaintiffs in sexual harassment cases have relied on both the tone of voice⁹⁸ and the look on a face.⁹⁹

A recent Ninth Circuit case held that the plaintiff had established a prima facie case of sexual harassment based on what can only be described as a pathetic romantic overture by a coworker.¹⁰⁰ The accused harasser, a revenue agent of the Internal Revenue Service named Gray, had asked the plaintiff, a fellow agent, out for a drink after work. The plaintiff declined but suggested that they have lunch the following week. The next week, Gray asked the plaintiff out for lunch, but she declined. The following week, Gray handed the plaintiff a note stating:

I cried over you last night and I'm totally drained today. I have never been in such constant term oil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day.¹⁰¹

Plaintiff left the room and asked a male coworker to tell Gray that she was not interested in him and to leave her alone. The next week, Gray sent plaintiff a three-page letter stating in part:

I know that you are worth knowing with or without sex. . . . Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style and elan. . . . Don't you think it odd that two people who have never even talked together,

95. *Egger v. Local 76, Plumbers & Pipefitters Union*, 644 F. Supp. 795, 797 n.3, 799 (D. Mass. 1986). See also *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 601-02 (7th Cir. 1985) ("advances took the form of leers, obscene gestures, lewd comments, remarks about her sexual needs now that her husband had left her, and promises that he would make it 'easy' for her at [work] if she would 'go out' with him") (*quid pro quo* case) (citations omitted); *Ford v. Revlon, Inc.*, 153 Ariz. 38, 40, 734 P.2d 580, 582 (1987) (supervisor told plaintiff, "I want to fuck you. I am going to fuck you."); *Scandinavian Health Spa, Inc. v. Ohio Civil Rights Comm.*, 1990 Ohio App. LEXIS 757 (1990) (harassment took form of supervisor's "smacking" charging party on buttocks, suggestions that charging party "go home and stay all night with" supervisor, suggestions that she have sex in back seat of car with owner, and "vulgar language" often accompanied by obscene gestures).

96. *Monge v. Superior Court*, 176 Cal. App. 3d 503, 507, 222 Cal. Rptr. 64, 65 (1986).

97. 735 F. Supp. 1497, 1499 (D. Kan. 1990). See also *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 211 (7th Cir. 1986) (plaintiff alleged that she had been "propositioned," which turned out on deposition to mean that the alleged harasser had asked to take her to a restaurant for drinks after work; not sufficient to create actionable hostile environment).

98. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1474 (3d Cir. 1990) (plaintiff asserted that alleged harasser spoke to her in "seductive tones").

99. See, e.g., *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 601 (7th Cir. 1985) (plaintiff complained of "leers"); *Zowayyed*, 735 F. Supp. at 1499 (D. Kan. 1990) (plaintiff alleged that company president made "goo goo eyes").

100. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

101. *Id.* at 874.

alone, are striking off such intense sparks . . . I will [write] another letter in the near future.¹⁰²

The letter also said, "I am obligated to you so much that if you want me to leave you alone I will. . . . If you want me to forget you entirely, I can not do that."¹⁰³ The Ninth Circuit reversed the district court's grant of summary judgment, rejecting the lower court's conclusion that the incident was "isolated and genuinely trivial"¹⁰⁴ and holding that "Gray's conduct was sufficiently severe and pervasive to alter the conditions of [plaintiff's] employment and create an abusive working environment."¹⁰⁵

Not all cases involve statements of views about women in general; sometimes the displays are more focused. For example, a female firefighter established a claim of sexual harassment based in large part upon the appearance of "blatant sexual mockery" in the form of graffiti and cartoons on the communal bulletin boards and living space of the firehouse.¹⁰⁶ A display that the court seemed to find among the more offensive was a cartoon posted in the firehouse depicting a woman firefighter at a men's urinal,¹⁰⁷ though the message seems quite "political" in the context of a fire department under orders to set positions aside for women.¹⁰⁸ The term "political" is used here and throughout the Article in its broad sense—that is, pertaining to matters of social policy. Speech expressing views about matters of social policy—such as the proper role of the races and sexes—should be considered political in the same sense that speech advocating nondiscriminatory treatment should be. The most obvious interpretation of the *Berkman* cartoon is that it is a negative comment on the notion of sexual integration of the fire department.

The importance of an anti-female message in harassment cases is starkly revealed by *Goluszek v. Smith*,¹⁰⁹ in which a male plaintiff claimed that male coworkers had harassed him. The plaintiff was an unsophisticated man who apparently was quite sensitive to comments about sex. His coworkers showed him pictures of nude women, told him they would get him "fucked," and poked him in the buttocks with a stick,¹¹⁰ all conduct that most courts would find constituted sexual harassment if directed toward women. Although the court ac-

102. *Id.* at 874 n.1.

103. *Id.* Shortly thereafter, Gray transferred to a different office, but almost immediately filed a union grievance requesting a return to his original office. The IRS and the union settled the grievance by allowing Gray to retransfer, provided he spend four more months in the new office and promise not to bother the plaintiff. When plaintiff learned that Gray was returning, she filed a charge of sexual harassment.

104. *Id.* at 876.

105. *Id.* at 878.

106. *Berkman v. New York*, 580 F. Supp. 226, 231 (E.D.N.Y. 1983), *aff'd*, 755 F.2d 913 (2d Cir. 1985). See also *Bennett v. Corroon & Black Corp.*, 517 So. 2d 1245, 1247 (La. App. 1987) (dismissal of harassment claim based on sexually oriented cartoons from magazines posted in men's room and labeled with names of various male and female employees affirmed because cartoons labeled with the names of both male and female employees).

107. *Berkman*, 580 F. Supp. at 232 n.7.

108. *Id.* at 228. See also *Williams v. Atchison, T. & S.F. Ry.*, 627 F. Supp. 752 (W.D. Mo. 1986) (black employees hired pursuant to affirmative action resented by existing white work force, many of whom were related by blood or marriage).

109. 697 F. Supp. 1452 (N.D. Ill. 1988).

110. *Id.* at 1454.

knowledgeed that Goluszek was harassed because he was a male,¹¹¹ it held that the harassment was not actionable under Title VII. Unlike this case, said the court, in a valid Title VII harassment case, "the offender is saying by words or actions that the victim is inferior because of the victim's sex."¹¹² Because Goluszek was a male in a male-dominated environment, the court reasoned that the harassment could not have embodied the message that he was inferior because of his sex.¹¹³

B. *Racial Harassment*

The message challenged in racial harassment is usually less ambiguous than that involved in the sexual context, where either the hostility message or the sexuality message may be operating. The objectionable message in racial harassment cases is generally one of hostility and prejudice. Racial slurs and epithets are common features of racial harassment cases.¹¹⁴ Black plaintiffs often complain that the word "nigger" was directed at them or used in their presence.¹¹⁵ In one case, a white woman who was married to a black man complained that she was called a "nigger lover."¹¹⁶

Sometimes racial slurs are used not in a personally provocative fashion but simply as part of the lexicon of the workplace. For example, in *Walker v. Ford Motor Co.*,¹¹⁷ the plaintiff, who was working at an automobile dealership in Florida, complained that poorly repaired cars were referred to as "nigger-rigged," the employee with the lowest sales was called the "black ass," and employees among themselves often referred to black customers as "niggers."¹¹⁸

111. *Id.* at 1456. The court also noted that if Goluszek were a woman, defendant would have taken action to stop the harassment. *Id.*

112. *Id.*

113. *Cf. Zabkowitz v. West Bend, Co.*, 589 F. Supp. 780 (E.D. Wis. 1984) (rejecting employer's defense in a sexual harassment case brought by a female employee that a male employee would have suffered equally brutal harassment even if of a different form).

114. *See, e.g., Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1257 (8th Cir. 1981) (no violation of Title VII because "use, if any, of racial terms was infrequent, was limited to casual conversation among employees, and with possible rare exceptions was not directed toward appellants"); *Taylor v. Jones*, 653 F.2d 1193, 1198-99 (8th Cir. 1981) (EEOC counselor reported repeated use of terms "niggers" and "spooks" and told by coworkers that he was a "token"; blacks called "boy"); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924 (5th Cir. 1982) (plaintiff referred to as "nigger," "coon" and "black boy"; no violation because no racial animus); *United States v. City of Buffalo*, 457 F. Supp. 612, 632 (W.D.N.Y. 1978) (coworkers referred to blacks as "Uncle Tom[s]"), *modified and aff'd*, 633 F.2d 643 (2d Cir. 1980); *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 385 (D. Minn. 1980) (coworkers referred to blacks both in private and in front of the charging party as "niggers").

115. For example, in *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981), the plaintiff complained that the terms "niggers" and "spooks" and racial jokes were expressed in his presence. *Id.* at 1198. One employee said in his presence, "Well, you know how that goes, they start treating us like niggers, they're making us park in the back and enter through the back door now." *Id.* at 1199. Other employees told him that he was a "token." *Id.* at 1198. *See also Carter v. Sedgwick County*, 705 F. Supp. 1474 (D. Kan. 1988) (plaintiff complained of being referred to as her supervisor's "token nigger").

116. *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 254 (N.D. Ind. 1985). *See also Snell v. Suffolk County*, 611 F. Supp. 521, 527 (E.D.N.Y. 1985) (use of words "nigger," "guinea," "polack," "kike," "mick," "black bitch," and "honkey" in workplace).

117. 684 F.2d 1355 (11th Cir. 1982).

118. *Id.* at 1358.

Only once was the plaintiff himself called a "nigger," and then the offending coworker apologized.¹¹⁹ Nonetheless, the court upheld the claim.

Crude racial graffiti and racist material posted on bulletin boards have also been found to support a finding of racial harassment. For example, in *EEOC v. Murphy Motor Freight Lines, Inc.*,¹²⁰ the court found a Title VII violation based upon a pattern of offensive writings. Signs were posted with such comments as "Ray Wells is a nigger," "The only good nigger is a dead nigger," "Ray Wells is a mother," "Send all blacks back to Africa," and "Niggers are a living example that Indians screwed buffalo."¹²¹ The court was particularly offended that one of the supervisors had laughed at an article derogatory of black persons that was posted on the bulletin boards, although the court did not describe what the article was about.¹²² Another case imposed liability in part on the basis of posters stating, "The KKK is still alive" and the wearing of "Wallace for President" buttons by on-duty police officers.¹²³ Harassment claims in a number of other cases have also relied on the posting of various racist materials on bulletin boards.¹²⁴

A sign suggesting that Archie Bunker should be elected President because "he would know how to handle niggers" has also been found to contribute to a hostile environment, as has the display of a wooden cross associated with the Ku Klux Klan.¹²⁵ The plaintiff in that case also complained that coworkers posted articles derogatory of black persons on bulletin boards. In *Moffett v. Gene B. Glick Co.*,¹²⁶ employees made comments in front of a white woman married to a black man such as "it would be a damn good day to hoist a nigger up a flagpole," "niggers ought to be shot like [Vernon Jordan] was," and "they ought to figure out some way so they'd quit breeding like that."¹²⁷ One of the defendants suggested that they go down to the local K-Mart and harass Jesse Jackson and other blacks who were picketing there.¹²⁸ In another case, *EEOC v. Beverage Canners, Inc.*,¹²⁹ the court found a hostile environment based upon references to

119. *Id.* at 1358, n.1.

120. 488 F. Supp. 381 (D. Minn. 1980).

121. *Id.* at 384.

122. *Id.* at 385-86.

123. *United States v. City of Buffalo*, 457 F. Supp. 612, 633 (W.D.N.Y. 1978), *modified and aff'd*, 633 F.2d 643 (2d Cir. 1980). It is important to note that what was involved here was not the employer enforcing an even-handed ban on the wearing of political buttons by uniformed police officers, but imposition of liability against the employer because the officers wore *certain* political buttons. That is, liability would not have been imposed based upon the wearing of Humphrey or McGovern buttons.

124. For example, in *Snell v. Suffolk County*, 611 F. Supp. 521, 525 (E.D.N.Y. 1985), materials included a "study guide" for minority police officers, consisting of puzzles such as one requiring the test taker to identify "How many Honkies are in this picture?," a cartoon depicting a Ku Klux Klan member who, after shooting a black person, asks a ranger, "Whatcha mean, 'Out of Season'?", a questionnaire beginning "Photo not necessary since you all look alike" and asking questions about how much time spent in prison and approximate estimate of income from theft, welfare, and false insurance claims. *See also Williams v. Atchison, T. & S.F. Ry.*, 627 F. Supp. 752, 756 (W.D. Mo. 1986) ("Ku Klux Klan application" posted on bulletin board).

125. *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 385 (D. Minn. 1980). *See also City of Buffalo*, 457 F. Supp. at 633 (W.D.N.Y. 1978) (black patrolman found statement "We don't want any niggers in this department" on his locker).

126. 621 F. Supp. 244 (N.D. Ind. 1985).

127. *Id.* at 255.

128. *Id.*

129. 897 F.2d 1067 (11th Cir. 1990).

blacks as "ignorant niggers" and "Swahilis" and comments to the effect that "blacks were meant to be slaves, and were of low intelligence."¹³⁰ In *Taylor v. Jones*,¹³¹ an employee who claimed to be a KKK member hung a hangman's noose in the supply room, and the court found the "message conveyed or attempted to be conveyed by that action was unmistakable,"¹³² although the court did not find that it constituted a physical threat.

The probability that at least some of the above speakers were punished because of their social attitudes about racial and sexual matters is quite high; indeed, some courts have expressly viewed Title VII as a prohibition on the expression of noxious views. Although declining to find a Title VII violation because of the employer's "remedial measures," the court in *Davis v. Monsanto Chemical Co.*,¹³³ made clear that Title VII prohibits espousal of certain viewpoints and requires employers to enforce that prohibition:

In essence, while Title VII does not require an employer to fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.¹³⁴

This passage was in the nature of a rebuke to District Judge Avern Cohn for having cited the following passage from *Howard v. National Cash Register Co.*:¹³⁵

The Archie Bunkers of this world, within limitations, still may assert their biased view. We have not yet reached the point where we have taken from individuals the right to be prejudiced, so long as such prejudice did not evidence itself in discrimination. This Court will secure plaintiff against discrimination; no court can secure him against prejudice. The defendant in this case is charged by law with avoiding all discrimination; the defendant is not charged by law with discharging all Archie Bunkers in its employ. Absent a showing of something other than disrespect and prejudice by his fellow workers, plaintiff cannot bring himself within the terms of either [Section 1981 or Title VII].¹³⁶

The Court of Appeals in *Davis* stated that Judge Cohn's citation of *Howard* suggested that he "may have misunderstood the true impact of Title VII."¹³⁷ The appellate court stated that "[b]y emphasizing the point that an employer 'is not charged by law with discharging all Archie Bunkers in its employ,' the district court may erroneously be encouraging the perpetuation of the status quo."¹³⁸ A clearer statement of censorial purpose would be difficult to find.

130. *Id.* at 1068 n.3.

131. 653 F.2d 1193 (8th Cir. 1981).

132. *Id.* at 1199.

133. 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989).

134. *Id.* at 350.

135. 388 F. Supp. 603 (S.D. Ohio 1975).

136. *Id.* at 606.

137. 858 F.2d at 350.

138. *Id.* (citation omitted).

In all of the above cases, defendants were haled into court to defend either their own expression or the expression of their employees. In all of these cases, courts have suggested that they have the power to impose liability, not just because the message was expressed in a particularly offensive manner but because of the offensiveness of the idea conveyed. The closer the expression came to statements such as "blacks don't belong here, because they are fit only to be slaves" or "women belong in the bedroom and not the factory," the more likely the courts were to uphold the claim.¹³⁹ In other words, the more "political" the message, the more offensive it was found to be. Even when the offending expression might ordinarily be considered devoid of ideological content—such as free-standing sexually explicit vulgarities or pictures—courts have felt compelled to give them some additional sociopolitical meaning to find a Title VII violation.¹⁴⁰ That is, courts have not simply identified words that are prohibited in the workplace. Instead, they have held that certain words may not be spoken in the workplace when they convey a message of disrespect toward certain groups. Surprisingly, the first amendment is seldom invoked in these cases, despite the fact that the question facing the courts is whether defendants may be held liable for expression that is often rife with social and political meaning.¹⁴¹

IV. VAGUENESS, VICARIOUS LIABILITY, AND THE CHILLING EFFECT

Two features of harassment law coalesce to create a substantial chilling effect on expression. The first is the vagueness of the standard; because it is unclear what is permitted and what is not, the law pressures speakers to steer well clear of the line between legal and illegal speech. The second is the system of vicarious employer liability: employers are charged by law with regulating

139. For example, in *Bailey v. Binyon*, 583 F. Supp. 923 (N.D. Ill. 1984), the court found for the plaintiff based upon a dispute between the plaintiff and her supervisor. When the supervisor stated, "all you niggers are alike," the employee responded that he wanted to be treated "like a human being"; the supervisor responded, "You're not a human being, you're a nigger." *Id.* at 925. In concluding that plaintiff's claim was valid, the court stated: "such comments 'are different qualitatively [from mere insults] because they conjure up the entire history of racial discrimination in this country.'" *Id.* at 934 (quoting *Words that Wound*, *supra* note 3, at 157).

140. *Illinois Dep't of Corrections v. Human Rights Comm'n*, 178 Ill. App. 3d 1033, 1049, 534 N.E.2d 161, 171 (1989) (obscenities were chosen "because of the expression of animosity they allow"); *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) (harassment took the form of "extremely vulgar and offensive sexually related epithets" that were "widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from 'the disgust and violence they express phonetically.'" (quoting *C. MILLER & K SWIFT, WORDS AND WOMEN* 120 (1977)); *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569, 573 (W.D.N.Y. 1987) ("The proliferation of [sexual] material may be found to create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal co-workers").

141. Courts have been so little concerned with the first amendment issue that they often do not even identify the words that serve as the basis for a finding of liability. Consider, for example, the approach of the Supreme Court of Iowa in *Lynch v. Des Moines*, 454 N.W.2d 827, 830 (Iowa 1990):

The district court made extensive findings of fact concerning the sexual comments and sexually-charged verbal abuse which had been aimed at Lynch by [two of her fellow police officers]. We choose not to dignify their conduct by recording it here. Suffice it to say that it involved repeated incidents of sexually derogatory remarks, vulgar insults, and requests for sexual favors which the City attempts to portray as "teasing" or "joking" but which were demeaning and insulting to Lynch, whatever their purpose.

In *Lynch*, the court also affirmed denial of the City's motion to amend its answer to raise a first amendment defense on timeliness grounds. *Id.* at 838.

the speech of their employees, and the incentives operating on the employer virtually compel it to overregulate.

A. *Vagueness*

Under the vagueness doctrine, a regulation of expression is invalid unless it provides reasonably clear notice of what speech is permitted and what is not. The person whose conduct is regulated is entitled to know what the law requires. Moreover, an unclear law regulating expression creates a substantial risk of deterring speech that is constitutionally protected.¹⁴² Additionally, a vague law allows judges and juries to impose liability on the basis of their own personal preferences.¹⁴³ Even if it should ultimately be determined that the speech is protected, "[t]he threat of sanctions may deter [exercise of first amendment freedoms] almost as potently as the actual application of sanctions."¹⁴⁴ The threat of expensive litigation acts as a similar deterrent, even where the employer has confidence that it will ultimately prevail.¹⁴⁵

Hostile-environment harassment regulation poses all of the above dangers. The definition of harassment provided by the EEOC Guidelines is: "[V]erbal . . . conduct of a sexual nature [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."¹⁴⁶

The Guidelines speak in terms of both action and consequences. The action—"verbal conduct of a sexual nature"—is prohibited when it has the consequence of either "interfering with an individual's work performance" or "creating an intimidating, hostile, or offensive work environment." The Supreme Court in *Vinson* added the limitation that to be actionable the conduct "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment.'"¹⁴⁷ These definitions give little notice of what expression is prohibited.¹⁴⁸

142. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

143. *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

The Court has also recognized as one of the bases of the vagueness doctrine the elimination of selective enforcement on a constitutionally suspect basis by police. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Although the "selective enforcement" rationale is usually directed towards improper discrimination by police officers, the same concern applies in the civil context, where disagreement with the message expressed may allow judges and juries to impose liability for messages of which they disapprove, while sparing those messages with which they agree. Moreover, that private civil actions are the mechanism for enforcement of the sexual harassment law increases the likelihood that speech will be challenged on an improper basis, because the intervention of police or prosecuting attorneys having no personal stake in the dispute is not required.

144. *Button*, 371 U.S. at 433.

145. For example, in *Lake v. Baker*, 662 F. Supp. 392, 405 (D.D.C. 1987), the court suggested that from the outset of her employment, plaintiff "embarked on a deliberate plan to expose the blatant sex discrimination that for some reason she believed would be present, and accordingly incorrectly interpreted every event that occurred as confirmation of her misguided perceptions"). See also, e.g., *Williams-Hill v. Donovan*, 1987 U.S. Dist. LEXIS 13992 *17 (suggesting that plaintiff was attempting to "turn a personal feud into a sex discrimination case by accusation").

146. 29 C.F.R. § 1604.11(a).

147. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

148. A comparison of the notice provided to defamation defendants and harassment defendants is instructive. A claim for defamation requires a showing of objective fact—that the defendant's statement is factually incorrect, RESTATEMENT (SECOND) OF TORTS § 581A; a claim for harassment requires satisfaction of a much more nebulous

The fact that distinguished appellate court judges disagree about whether a statutory violation can rest in part on a desk plaque stating "Even male chauvinist pigs need love,"¹⁴⁹ suggests that those subject to regulation will not be able to predict whether expression of that general sort is prohibited. On a wide variety of facts, a judge or jury could find that prohibited harassment did or did not exist, and only in extreme cases could it fairly be said that the decision was wrong as a matter of law.¹⁵⁰

Another feature of sexual harassment law that leads to overregulation of speech is that the existence of a hostile environment is determined by the "totality of the circumstances." The court in *Robinson v. Jacksonville Shipyards, Inc.*,¹⁵¹ described the standard as follows:

[T]he analysis cannot carve the work environment into a series of discrete incidents and measure the harm adhering in each episode. Rather, a holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes. . . . It follows naturally from this proposition that the environment viewed as a whole may satisfy the legal definition of an abusive working environment although no single episode crosses the Title VII threshold.¹⁵²

Although there is compelling logic behind the notion that one must examine the totality of the environment to determine whether it is hostile, this standard means that the determination of whether Title VII prohibits a given utterance depends not only on the content, and context, of that particular statement but on everything else that has been said, both by the speaker and all of the plaintiff's coworkers. Thus, there is no way for an employer to establish narrow rules about what cannot be said in the workplace, because the mix of expression (and conduct) that will be called upon to support a harassment claim will be unknown until the lawsuit comes.

standard—that the statement created an offensive work environment. Moreover, a claim for defamation requires that the defendant acted at least negligently. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346-47 (1974); a claim for harassment is established if the speech has either the "purpose or effect" of creating a hostile environment. Thus, a potential defamation defendant knows that his speech cannot subject him to liability unless it is both objectively false and spoken with a culpable mental state. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (breathing space for expression "is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove both that the statement was false and that the statement was made with the requisite level of culpability"). The potential harassment defendant has no such assurance and must simply hope that all of the statements that are "put in the hopper" at trial will not be enough to convince the trier of fact that the working environment was sufficiently offensive.

149. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 624 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987).

150. This is especially true if the subjective reactions of the plaintiff are considered determinative. See, e.g., *Abrams*, supra note 86, at 1213 n.120 (suggesting that "male judges" should not "substitute their perceptions of the balance of positive and negative messages the plaintiff was receiving" from her coworkers). See also *Harris v. Int'l. Paper Co.*, 1991 U.S. Dist. Lexis 4340, * 21 (the "fact finder must 'walk a mile in the victim's shoes'" and employ the standard "of a reasonable black person, as that can be best understood and given meaning by a white judge").

151. 1991 U.S. Dist. LEXIS 794 (M.D. Fla. 1991).

152. See also *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) (reversing trial court's finding that work environment was not hostile, reasoning that the court erroneously failed to "concentrate not on individual incidents, but on the overall scenario"); *Barbetta v. Chemlawn Serv. Corp.*, 669 F. Supp. 569, 572 (W.D.N.Y. 1987) ("whether sexual harassment is 'sufficiently pervasive' to constitute a Title VII violation is to be determined from the totality of the circumstances").

B. Vicarious Liability

If Title VII regulated offensive speech only directly, substantial restrictions on protected expression would still occur. However, the system of holding employers liable for the offending expression of their employees under a vague standard dramatically increases the chilling effect on constitutionally protected speech. Employers are generally held liable for a hostile environment if they knew or should have known of it and failed to take adequate steps to remedy it.¹⁵³ That is, the law charges employers with acting as censors of their employees' speech, and under-censorship carries with it substantial risk to the employer. The mere existence of anti-harassment policies is not a defense,¹⁵⁴ nor is it necessarily sufficient for an employer to conduct an investigation and act according to its good-faith belief in the results of the investigation. Courts have often required that the employer take extensive steps to prevent further harassment, including discharging the alleged harasser if necessary.¹⁵⁵ Even that will not insulate employers from liability where courts impose automatic vicarious liability irrespective of notice to the employer or the existence of subsequent remedial measures.¹⁵⁶

Because of its own liability for the acts of its employees, most employers have adopted policies to prevent harassment from occurring and to punish it when it does.¹⁵⁷ That was, of course, the reason for imposing employer liability

153. See *supra* note 48 and accompanying text. See also *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988) (the law requires "that an employer take prompt action to prevent . . . bigots from expressing their opinions in a way that abuses or offends their co-workers"); *Taylor v. Jones*, 653 F.2d 1193, 1199 (8th Cir. 1981) ("employer toleration of a discriminatory atmosphere alone gives rise to a cause of action by the plaintiff"); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1185 (2d Cir. 1987) ("Although we recognize that an employer is unable to guarantee a working environment uncontaminated by foul invective, the law nonetheless provides that when an employer knows or reasonably should know that co-workers are harassing an employee because of that individual's race, color, religion, sex, or national origin, the employer may not stand idly by."); *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 386 (D. Minn. 1980) ("strong steps are necessary to ascertain and to sensitize or, if necessary, discipline the prejudiced clique of employees who were the prime offenders").

154. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

155. See *Waltman v. International Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989) (company liable for employee's broadcast of obscenities over P.A. system even though employee told to refrain on ground that "more than mere verbal chastisements" was needed in order for the employer "forcefully to convey the message" that such speech would not be tolerated) (quoting *DeGrace v. Rumsfeld*, 614 F.2d 796, 805 n.5 (1st Cir. 1980)); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990) (employer liable because it knew or should have known of harassment even though harasser was discharged as soon as upper management learned of it); *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 386 (D. Minn. 1980) (rejecting employer's argument that it had not taken stronger steps because it might stir up further racial tensions and stating that "strong steps are necessary to ascertain and to sensitize or, if necessary, discipline the prejudiced clique of employees who were the prime offenders"; *id.* at 385 (employer affirmatively "participated in the harassment by . . . [its] delay in removing the derogatory article from the company bulletin board"); *Lynch v. Des Moines*, 454 N.W.2d 827, 835 (Iowa 1990) (affirming finding of employer liability on ground that employer did not act quickly enough, even though it suspended harassing coworkers for harassment and supervisor for ineffective supervision after plaintiff's complaints); *Cf. Ferguson v. E.I. duPont de Nemours & Co.*, 560 F. Supp. 1172, 1199 (D. Del. 1983) ("Furthermore, even though such actions were out of character for [the alleged harasser, the division manager] assumed the truth of the allegations, took prompt remedial measures, and the incidents indisputably stopped. Under such circumstances, Du Pont will not be held liable for the environment created by [the alleged harasser.]"); *Bennett v. Corroon & Black Corp.*, 517 So. 2d 1245 (La. App. 1987) (employer not liable for cartoons posted because once notified of the incident, it investigated and terminated the chief executive officer), *writ denied*, 520 So. 2d 425 (La. 1988).

156. See *supra* note 54 and accompanying text.

157. See *Waks & Starr, Sexual Harassment in the Work Place: The Scope of Employer Liability*, 7 EMPLOYEE REL. L.J. 369, 385 (1981-82) ("The company should effectively communicate this policy to its supervisory

in the first place.¹⁵⁸ However, the predictable result of imposition of liability on employers is that expression is stifled to a far greater degree than when the individual speaker is directly punished, with employers limiting speech of employees, at least male employees,¹⁵⁹ "to that which is unquestionably safe."¹⁶⁰

When an individual's speech is potentially directly punishable, the amount of speech in which he will engage is a result of two counteracting pressures. On the one hand, a desire to escape punishment creates a disincentive to engage in speech; on the other hand, a desire to achieve whatever gratification results from self-expression creates an incentive to come as close to the line as possible. The result is that, at least when the legal standards are clear, the amount of expression that is inadvertently prevented may be minimal.

When liability is imposed on employers for the speech of their employees, the incentives are somewhat different. The question facing employers, acting under no constitutional constraints in the private sector, is how much of their employees' speech to prohibit in the workplace. As with the individual employee, the employer has an incentive to limit expression—fear of litigation and punishment. Unlike the individual, however, the employer confronts no counterbalancing pressure to limit overregulation, at least until the employer's regulation reaches the point at which the restrictions create severe morale problems. The employer receives little gratification from its employees' free speech, but it faces litigation costs and damage awards if its efforts to regulate such speech are deemed inadequate.¹⁶¹ The rational employer, therefore, does not prohibit merely the expression of actually prohibited language; it prohibits, and punishes, all expression that could even arguably be viewed as impermissible.¹⁶²

personnel. If they refrain from sexual harassment themselves, and if they can prevent co-workers from sexually harassing their fellow employees (*i.e.*, rid the work place of 'the locker room atmosphere'), there will be no conduct on which an employer's vicarious liability can be based").

158. Citing the EEOC Guidelines, the court in *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), stated: "The general goal of these Guidelines is *preventive*. An employer may negate liability by taking immediate and appropriate corrective action when it learns of any illegal harassment, but the employer should fashion rules within its firm or agency to ensure that such corrective action never becomes necessary." *Id.* at 947 (emphasis in original; citations omitted).

159. See *Nicolo v. Citibank of New York*, 147 Misc. 2d 111, 554 N.Y.S.2d 795 (N.Y. Sup. Ct. 1990) (male plaintiff complained that he was discharged for telling obscene stories and displaying obscene materials, while female employees were not disciplined for similar conduct; complaint dismissed for lack of specificity).

160. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

161. The pressure on employers to censor the speech of their employees will be greatly increased should Title VII be amended to allow for compensatory and punitive damages. The Civil Rights Act of 1990, H.R. 4000, 101st Cong., 2d Sess. (1990); S.2104, 101st Cong., 2d Sess. (1990), would have done just that, but it was vetoed by President Bush. 136 Cong. Rec. S16562 (daily ed. Oct. 24, 1990). The Civil Rights Act of 1991, at this writing introduced in the House but not the Senate, would do the same. If the rhetoric of the Act's supporters is to be believed, the "deterrent effect" of Title VII—read "pressure to censor"—will be greatly strengthened.

162. The large number of wrongful discharge actions that have been brought by alleged harassers suggests that employers have reacted strongly. See, e.g., *Walton v. J.C. Penney Co.*, 147 Wis. 2d 880, 434 N.W.2d 621 (1988) (table) (text at 1988 Wis. App. LEXIS 1010 *5 (1989)) (affirming dismissal of wrongful discharge action of plaintiff who was discharged for "sexual harassment" based on unspecified "profane language," "sexually suggestive remarks," and "off-color" remarks). *Derstein v. Benson*, 915 F.2d 1410 (10th Cir. 1990) (plaintiff discharged for sexual harassment unsuccessful in action alleging denial of due process where he was summarily discharged without a hearing on the basis of an investigation that did not seek to obtain his side of the story). See also *Eudela v. Ohio Dep't of Mental Health and Mental Retardation*, 30 Ohio App. 3d 113, 506 N.E.2d 947 (1986) (upholding discharge of public employee based upon charges of harassment by female employee whom employer would not identify and where employer would not specify the times, dates or places of the offending

Sensitivity to the speech interests of alleged harassers is a risky proposition for the employer. For example, in *Moffett v. Gene B. Glick Co.*, the following letter from one supervisor to another was used against the employer in a case dealing with harassment of a woman who was involved in a relationship with a black man and later married him:

Becky, I'm afraid if Sue is entering into this relationship she had better be prepared to get snide remarks from just about anyone and everyone. I don't think inter-marriages are accepted in our society today and although you and I certainly would not say anything, I am not sure we can keep our staff from saying things. I am not sure that we could fire them on the basis of their remarks. You had better check with [the company lawyer] and see if he agrees with what I am saying.¹⁶³

The court found that this memo was "[t]he most convincing evidence of Glick's toleration of the harassment" and "ample evidence of an intent to discriminate against [plaintiff] on the basis of her race because it shows that Glick would not act against [plaintiff's] harassers due to an intolerance for interracial relationships."¹⁶⁴ Faced with such judicial attitudes, it is not surprising that employers have tended not to be overly concerned with employee free speech.

If it were clear what expression was prohibited by harassment laws—for example, if only certain specified words were banned—the law would not encourage employers to "overcensor" by forbidding what the law did not. However, any statute that was specific enough as to provide reasonable notice of what was prohibited would likely have only a trivial effect on working environments since creative substitutes for the prohibited words could be employed. It is the *in terrorem* effect of a vague standard that is largely responsible for the aggressive reaction of employers. Moreover, the fluidity of the standard adds to the chilling effect created by its vagueness. In *Ellison v. Brady*,¹⁶⁵ the court

conduct). *Cf. Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 766 P.2d 280 (1988) (affirming judgment for plaintiff in wrongful discharge action by accused harasser because evidence that investigation was inadequate could justify jury finding that employer lacked reasonable grounds to discharge), *cert. denied*, 109 S. Ct. 3163 (1989).

Although one's initial reaction might be that the availability of a wrongful discharge action acts as a counter to employer overregulation, that is not so. First, such protection is not available to at-will employees. Second, and more important, just-cause protection is largely procedural. That is, the employee may challenge a discharge on the grounds that he had insufficient notice that his conduct would subject him to discharge or that he did not engage in the conduct for which he was discharged. However, an employer has the right to prohibit conduct that would not amount to sexual harassment, and there is little, if any, judicial inquiry into the merits of such a rule. *See, e.g., Crosier v. United Parcel Serv., Inc.*, 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983) (upholding discharge of employee for violating non-fraternization policy by engaging in consensual sexual relationship with fellow employee, reasoning that purpose of policy was in part to avoid claims of sexual harassment).

163. 621 F. Supp. 244, 259 (N.D. Ind. 1985).

164. *Id.* at 275. *See also Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794, at *85 (M.D. Fla. 1991) (holding employer liable for refusing the plaintiff's request to order sexual pictures taken down; the employer had responded that "the men had 'constitutional rights' to post the pictures"); *Erebia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250, 1252 (6th Cir. 1985) (Mexican-American supervisor who complained to personnel manager that subordinates called him a "wetback" was told that it was nothing but "shop talk" but that if he wanted to pursue charges of insubordination he should "build a case" against the union employees; sufficient to establish employer liability), *cert. denied*, 475 U.S. 1015 (1986); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (plaintiff was told that the use of racial terms in the workplace that were not directed at him were "just something a black man would have to deal with in the South"; sufficient to establish employer liability); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 906 (1st Cir. 1988) ("Dr. Gonzalez' dismissal of these anti-female remarks as mere 'jest' may demonstrate his insensitivity to them.").

165. 924 F.2d 872, 879 n.12 (9th Cir. 1991).

noted that “[c]onduct considered harmless by many today may be considered discriminatory in the future.”¹⁶⁶ In response to the concern that the “reasonable woman” standard that it adopted would not address conduct that some women find offensive, the court provided the consolation: “Fortunately, the reasonableness standard which we adopt today is not static. As the views of reasonable women change, so too does the Title VII standard of behavior.”¹⁶⁷ What the *Ellison* court failed to realize is that the “evolving standard” approach is a one-way ratchet that leads inevitably to increasing censorship. It will be the rare utterance that is actionable today but not actionable tomorrow; the law itself affects attitudes about what is reasonable, and one of those attitudes is that speech that is actionable should not be expressed. Thus, the standard will seldom recede. On the other hand, expression that is not actionable today will be held actionable tomorrow by analogy and extension both because courts will be unable to articulate a principled basis for distinguishing the already-banned speech from the challenged speech and because of the pride that courts often take in being in the vanguard of our evolving standards of decency.

An example of the existing pressure for censorship is contained in a guide for employers prepared by the Massachusetts Advisory Committee to the United States Commission on Civil Rights. The guide advises employers that sexual harassment is “any unwanted attention of a sexual nature that occurs in the process of working or seeking work and jeopardizes a person’s ability to earn a living.”¹⁶⁸ Harassment, advises the Committee, “ranges from annoying or distracting comments to acts of intimidation, threats, and demands involving sexual conduct.”¹⁶⁹ Lest employers conclude that comments in the workplace are trivial and unworthy of employer intervention, the booklet goes on to warn that “[a]cts that may appear to the bystander to be humorous or insignificant may be disturbing and distracting from the victim’s perspective—sufficiently so to lead to a decline in work performance or a rise in absenteeism.”¹⁷⁰ Finally, it warns employers of the risks of permitting any conduct or expression that even arguably constitutes sexual harassment:

Sexual harassment is illegal and employees are increasingly filing complaints against their employers. Defending lawsuits is time-consuming and costly, even when the employer wins, and can be even more costly if the employer loses. Steps taken to prevent sexual harassment from occurring in your workplace can be well worth the time and effort involved.¹⁷¹

166. *Id.* at 879 n.12.

167. *Id.*

168. Massachusetts Advisory Comm. to the U.S. Comm’n on Civil Rights, *Sexual Harassment on the Job: A Guide for Employers* 7 (1983).

169. *Id.* Strauss reports that the Los Angeles Commission on the Status of Women has proposed banning “all unwelcome written, verbal, or physical contact with suggestive overtones, including suggestive letters, jokes, displays of suggestive objects, pictures, cartoons, and posters. Strauss, *supra* note 1, at 3.

170. See *supra* note 168.

171. *Id.* at 9. The booklet also recommends that employers conduct a survey of employees to determine whether they believe that they have been subjected to sexual harassment. The definition of sexual harassment provided by the questionnaire includes “[a]ttention of a sexual nature (degrading comments, propositions, jokes or tricks, etc.) that you do not want” and “annoying or degrading remarks about sex.” A suggested sexual harassment policy would prohibit “[a]busing the dignity of an employee through insulting or degrading sexual remarks or conduct.” *Id.* at 18.

The above example is not meant to suggest that employers are receiving bad legal advice when they are advised to adopt stringent measures to combat harassment. On the contrary, in today's legal environment employers should be encouraged to prevent employees from making comments that are even arguably offensive and to refrain from "shop talk" and off-color, racial, or ethnic jokes.¹⁷² The soundness of the advice underscores the extraordinary chilling effect of the law.

Given the pressures on employers, it is not surprising that they have responded forcefully; yet, even when they appear to have acted entirely reasonably, they still cannot avoid the burden of litigation. In *Tunis v. Corning Glass Works*,¹⁷³ for example, the plaintiff complained to the plant manager about photographs of "naked or nearly naked women in sexually suggestive poses displayed on the walls," telling him that the EEOC had informed her that such displays were illegal. The manager toured not just the plaintiff's work area, but the entire plant as well, and ordered a supervisor to take down the materials that he had seen and to make another tour of the area to look for any material that he might have missed. A week later, the plaintiff complained that offensive photographs were still on display. The plant manager sent the supervisor back out to look for them, but he could not find any. The manager then instructed the supervisor to have the plaintiff show him where the pictures were. They located a postcard on the inside cover of the tool box of one of the maintenance employees, and it was ordered removed.

Plaintiff's presence when the postcard was found exposed her as the cause of the removal of the photographs throughout the plant. Thereafter, whenever she visited areas of the plant from which the pictures were removed, she was subjected to "whistles, catcalls and grunts." Plaintiff then complained about the whistling to the plant manager, who personally went to the area to speak to the union representative and to several supervisors and employees he regarded as influential, urging them to cooperate in having the conduct stopped. Apparently the whistling did not stop, but because the plaintiff could not identify who was responsible, management took no further action beyond announcing that such conduct was inappropriate.

Tunis had also complained about the use of sex-based job titles, such as "foreman" and "draftsman." Although the titles had been formally changed by the company to sex-neutral terms, employees continued to use the old terms in conversation. Tunis repeatedly interrupted conversations—even ones to which she was not party—to correct the speakers if gender-based terminology was used, and she even went to such lengths as crossing out gender-based terms in a logbook, which resulted in the entries not making sense. Because of Tunis' com-

172. One reason for such caution is that even if a plaintiff is not offended by the speech at the time, harassment actions often arise after discipline or discharge. See *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 347 (6th Cir. 1988) (plaintiff was repeatedly disciplined, and when termination appeared imminent, he filed a racial harassment charge), *cert. denied*, 109 S. Ct. 3166 (1989); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924 (5th Cir. 1982) (racial terms bandied about with no apparent hostility; plaintiff later quit after being given a job assignment he did not want and brought an action alleging constructive discharge based upon racial harassment).

173. 747 F. Supp. 951 (S.D.N.Y. 1990).

plaint, the plant manager sent out a memorandum stating that sex-based terminology "was no longer appropriate."

After later being discharged for poor performance, Tunis filed a Title VII action, alleging that the photographs, the whistles and catcalls, and the gender-based terminology created a hostile environment, and the case actually went to trial.¹⁷⁴ Although the court ultimately ruled against the plaintiff, it did so not because the conduct complained of did not violate Title VII, but because of the employer's remedial actions. As to the pin-ups, the court observed that the pictures were immediately taken down from the walls, and the existence of the postcard in the toolbox was "insufficient to support a conclusion that defendant failed to take reasonable remedial action promptly." Addressing the use of gender-based terminology by employees, the court was ambiguous about whether in the absence of an effective employer response it would violate Title VII.¹⁷⁵ Finally, turning to the whistles and catcalls, the court suggested that in the absence of an effective employer response, plaintiff would prevail: "No female employee should be required to confront whistling, catcalls or other sexually suggestive noises from male employees, individually or in groups." However, "[s]ince prompt remedial action reasonably calculated to resolve the problem was taken, a claim of sexual harassment based on this complaint under Title VII cannot prevail."

Cases like *Tunis* send strong messages to employers. In *Tunis*, the employer did everything right and was commended by the court for having gone to such lengths to stifle the expression of its employees: the employer prohibited employees from having sexual postcards in their tool boxes, from referring in casual conversation to "foremen" and "draftsmen," and from addressing whistles and catcalls to the person responsible for the restriction of their expression. Although the court declined to decide whether the pictures and the gender-based language would have violated Title VII in the absence of an effective employer response, the message to employers is the same as if the court had found a violation:¹⁷⁶ employers seeking to escape liability should restrict the expression of their employees, and if they seek to escape litigation altogether, they should be very aggressive in imposing those restrictions.

The chilling effect created by the legal regime applicable to hostile-environment cases is brought into stark relief by the remedial orders issued in some

174. A summary judgment motion by the employer had previously been denied. *Tunis v. Corning Glass Works*, 698 F. Supp. 452 (S.D.N.Y. 1988).

175. *Tunis*, 747 F. Supp. at 959 (In the first sentence of the paragraph, the court stated that use of the terminology did not "constitute a Title VII violation," but most of the rest of the paragraph deals with the employer's remedial measures.).

176. The approach taken by the *Tunis* court—declining to decide whether particular expression violates Title VII—is a common tack. While it is generally appropriate for courts to decide no more than they need to, this approach has led to a great deal of uncertainty of what the law requires, which, once again, exacerbates the chilling effect. See, e.g., *Harlow v. Kansas City*, 1990 U.S. Dist. LEXIS 8473 *4 (W.D. Mo. 1990) (stating that coworker's use of foul language "including 'the "F" word' . . . asshole and bastard . . . may or may not constitute sexual harassment," but declining to decide because the employer's summary judgment motion was denied based upon other incidents); *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627 (Iowa 1990) (stating that claim of religious harassment based upon statements to the effect that Catholics are stupid and have a lot of kids was a "close one," but the issue need not be decided because the employer's response was adequate).

harassment cases. For example, in *Snell v. Suffolk County*,¹⁷⁷ the court, after finding a racially hostile atmosphere, established "an absolute prohibition on racial 'joking.'" Asserting that "a radical shock to the mores" was needed, the court continued:

Whatever prejudice may manifest itself in society at large, Congress has flatly ruled that it will not be allowed in the workplace in the United States. Prejudice, whether blatant or subtle, whether practiced by those wearing blue collars or white collars, whether the expression of those wearing correction officers' uniforms or grey flannel suits, will not be tolerated when directed against employees in the workplace.

It then issued the following injunction:

The warden "shall forbid the use by correction officers on any County property and on all County business of: (1) epithets such as 'nigger,' 'polack,' 'kike,' 'spic,' 'guinea,' 'honky,' 'mick,' 'coon,' and 'black bitch' (all of which have been used on the job by correction officers in recent years); (2) posting or distribution of derogatory bulletins, cartoons, and other written material; (3) mimicking officers because of what some correction officers may believe to be stereotypical characteristics of minorities; and (4) any racial, ethnic, or religious slurs, whether in the form of 'jokes,' 'jests,' or otherwise."¹⁷⁸

Despite the extraordinary breadth of this prior restraint, the court's recognition of the first amendment implications of its order was limited to the statement that "[f]or reasons beyond the scope of this opinion, the First Amendment does not bar appropriate relief in the instant case of discrimination in the workplace."¹⁷⁹

V. HARASSMENT REGULATION AND FIRST AMENDMENT DOCTRINE

First amendment principles are fully applicable to claims for hostile-environment harassment under Title VII.¹⁸⁰ Although the primary method of en-

177. 611 F. Supp. 521, 531 (E.D.N.Y. 1985).

178. *Id.* at 532. See also *Berkman v. New York*, 580 F. Supp. 226, 245 (E.D.N.Y. 1983) (issuing "a decree prohibiting defendants, their officers, and employees from further sexual discrimination and harassment interfering with their training and work and requiring defendants to take active steps to assure that neither the particular acts of discrimination revealed by this trial record nor other acts of discrimination repeat themselves"). Among the incidents complained of in *Berkman* was a cartoon showing a woman firefighter standing at a urinal. *Id.* at 231 n.7. Presumably all cartoons having any sexual overtones at all are encompassed by the court's decree. Similarly in *Sanchez v. Miami Beach*, 720 F. Supp. 974 (S.D. Fla. 1989), a case in which the plaintiff complained of, *inter alia*, references to women as "broad" and the posting of pictures from *Playboy* and *Penthouse*, the court issued an injunction requiring the employer to cease any "conduct herein described or related thereto."

179. *Snell v. Suffolk Co.*, 611 F. Supp. at 531.

180. It should be noted that this Article does not deal with the question of the extent to which a governmental employer *qua* employer may regulate offensive speech of its employees. As the Supreme Court stated in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."

The uncontroversial statement from *Pickering* was ignored, however, by the court in *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794, at *159-60 (M.D. Fla. 1991), where the court reasoned that it had the power to regulate the speech of private-sector employees to the same extent that a government employer can regulate the speech of its own employees:

[T]he public employee speech cases lend a supportive analogy. If this Court's decree is conceptualized as a governmental directive concerning workplace rules that an employer must carry out, then the present inquiry is informed by the limits of a governmental employer's power to enforce workplace rules impinging on free speech rights. In the public employee speech cases, the interests of the employee in commenting on

forcement of the harassment prohibition is through civil actions between private parties, imposition of liability by the courts under federal and state statutes easily falls within the definition of "state action." Just as the first amendment limits the outlines of state civil actions between private parties for libel,¹⁸¹ tortious interference with business relations,¹⁸² and intentional infliction of emotional distress,¹⁸³ the first amendment governs state and federal courts in their decisions concerning liability for expression deemed harassing. The fact that the enforcement mechanism is through the civil courts rather than the criminal courts does not make the statute any less a burden on first amendment rights.¹⁸⁴

Just as there is no state-action impediment to a first amendment challenge, there is no problem with an employer's "standing" to assert a first amendment defense.¹⁸⁵ Although it might appear at first glance that the employer is asserting its employees' constitutional rights rather than its own, that is not so for several reasons. First, there is not even an issue of standing when the employer's liability for supervisory harassment is premised on the theory that the supervisor is the agent of the employer, because the employer is being called to answer for "its own" conduct. Second, when liability is imposed because of the employer's failure to censor its employees, the employer is raising not only its employees' first amendment rights but its own as well.¹⁸⁶ That is, the employer is arguing that a law that holds it liable for failing to censor protected speech violates its own first amendment rights. The government may no more compel a person to censor the protected speech of those over whom he has control on the ground that the government finds it offensive, than the government may compel

protected matters is balanced against the employer's interests in maintaining discipline and order in the workplace. When an employee's exercise of free expression undermines the morale of the workforce, the employer may discipline or discharge the employee without violating the first amendment. Analogously, the Court may, without violating the first amendment, require that a private employer curtail the free expression in the workplace of some employees in order to remedy the demonstrated harm inflicted on other employees.

(Citations omitted). This is a truly bizarre argument. The government employer enjoys greater authority to regulate the speech of its own employees because it is acting as an employer rather than as a regulator. Acceptance of the *Robinson* court's reasoning—that anything a government agency may do in its proprietary capacity, a court may enforce against private parties—would dramatically increase the reach of governmental power.

181. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

182. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

183. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

184. Monetary awards in civil cases often dwarf the size of a criminal fine for the same conduct. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (civil judgment a thousand times greater than maximum penalty provided by relevant criminal statute). Also, the exercise of discretion by prosecutors, who are at least in theory objective, will often weed out weak cases, but a civil plaintiff's hope for a "pot of gold at the end of the rainbow," either by way of judgment or settlement, may prompt the filing of a case that no prosecutor would even consider.

185. Although my colleague Robert Sedler has argued that it is incorrect to view this as a standing issue—arguing instead that the question of *jus tertii* is a wholly separate doctrine—the term "standing" is used here because that is the term used in common parlance. See Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CALIF. L. REV. 1308, 1315-19 (1982).

186. Under the Supreme Court's precedents, the employer probably *could* raise the argument that the law violates the first amendment rights of its employees. See, e.g., *Craig v. Boren*, 429 U.S. 190, 192-93 (1976) (permitting a bar owner to "rely upon the equal protection objections of males 18-20 years of age to establish her claim of unconstitutionality" of a state law that prohibited the sale of beer to males under age 21 and females under age 18).

a person to express a message that he chooses not to express.¹⁸⁷ In any event, the employer is free to argue for a narrow construction of Title VII to avoid constitutional problems, even if such a construction is necessary only to protect third parties. That is, the employer has standing to argue to the court, "You should not interpret Title VII in this way, because if you do it will result in an impairment of my employees' first amendment rights."¹⁸⁸ Employers need not show that the specific acts of speech for which they are punished are protected by the first amendment. Under the doctrine of overbreadth, even one who engages in unprotected expression may mount a facial challenge to a law that inhibits a substantial amount of legally protected expression of others who may refrain from the expression rather than risk prosecution.¹⁸⁹

The failure of courts to consider first amendment principles in harassment cases is understandable, if for no other reason than that defendants seldom raise the issue.¹⁹⁰ Even when courts address the issue, however, they have tended to dismiss it summarily.¹⁹¹ Yet, hostile-environment harassment regulation poses a far greater threat to expression than other restrictions that receive far more attention, such as prohibition of flag-burning.¹⁹² Labelling a statement "racist" or "sexist" might in some circumstances be the point at which analysis should begin, but it cannot be the point at which it ends.

Had courts squarely faced the first amendment issue in hostile-environment cases, they could not have employed the EEOC Guidelines as they did without creating a new exception to the first amendment. The standard for hostile-environment harassment cases is strongly viewpoint-based and can be upheld only

187. See *Wooley v. Maynard*, 430 U.S. 705 (1977).

188. Thus, the court in *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. Lexis 794, at *154-55 (M.D. Fla. 1991), missed the point in asserting that because the employer had "disavowed that it seeks to express itself through the sexually-oriented pictures or the verbal harassment by its employees . . . [n]o first amendment concern arises." Under this reasoning, the unconstitutionality of a state law allowing prosecution of parents for the anti-war protests of their children could not be asserted in a criminal prosecution of the parents because the expression of the *parents* was not being punished.

189. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985).

190. See Note, *The Harms of Asking*, 55 U. CHI. L. REV. 328, 351 n.93 (1988) ("No defendant has argued in a reported case that his conduct is constitutionally protected").

191. See, e.g., *Scandinavian Health Spa, Inc. v. Ohio Civil Rights Comm'n*, 1990 Ohio App. LEXIS 757 (1990), which summarily rejected a first amendment defense not on the basis of first amendment precedent, but on the basis of the Supreme Court's statement in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), that Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Snell v. Suffolk County*, 611 F. Supp. 521, 531 (E.D.N.Y. 1985) ("For reasons beyond the scope of this opinion, the first amendment does not bar appropriate relief in the instant case of discrimination in the workplace"); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 610 (S.D.N.Y. 1981) (acknowledging that in other circumstances, the first amendment might be implicated). Cf. *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 431 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987):

[T]he court need only decide whether the complained of conduct was "verbal conduct of a sexual nature."

At once it must be recognized that a constitutional First Amendment issue is raised. This issue can be framed as follows: can Title VII prohibit people from verbally expressing themselves with language that is not "obscene" under the legal definition of the term?

The district court in *Rabidue* found it unnecessary to resolve the question, because it found that the expression at issue did not violate Title VII.

192. See *Texas v. Johnson*, 491 U.S. 397 (1989). A law prohibiting flag-burning prohibits only one discrete expression of a particular message. Any other communication of the same idea in the same place and with the same intensity is permitted. The same cannot be said of harassment regulation.

by a showing of a government interest of the highest order. No currently recognized first amendment doctrine can explain the analysis in these cases.

A. Labor Speech

If any single aspect of first amendment law could be identified as the primary cause of the silence greeting the restriction of expression under Title VII, it is the assumption that the first amendment has no application in the workplace. Courts have assumed, without much explanation, that even if the speech involved would be protected if uttered in the street, the workplace is sufficiently different from the street that a greater degree of regulation is permissible.¹⁹³ Although the Supreme Court has endorsed a higher degree of regulation of speech in the workplace in limited situations, none of its precedents in this area supports the view that the speech at issue in harassment cases is entitled to diminished protection. Indeed, the reflexive assumption that speech in the workplace is not constitutionally protected is a classic illustration of Cardozo's dictum that "[t]he half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten."¹⁹⁴

The assertion that there is no general right of free speech in the workplace is based primarily upon *NLRB v. Gissel Packing Co.*,¹⁹⁵ in which the Supreme Court upheld an order of the National Labor Relations Board requiring an employer to bargain with a union that had lost an election. The Board had issued

193. See, e.g., *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 n.13 (11th Cir. 1987) (the whole point of the sexual harassment claim often is the abusiveness in the workplace of behavior which may be acceptable in other social relationships); *Snell v. Suffolk County*, 611 F. Supp. 521, 528 (E.D.N.Y. 1985) (although "[c]oncern about privacy interests suggests that the courts not become involved in policing what citizens say and do in their homes and at social gatherings . . . [t]he workplace is different because it is governed by Congress's mandate that discrimination in employment will no longer be tolerated in this country"); *Doe v. University of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (striking down on first amendment grounds a university policy prohibiting harassment of students, but suggesting in dictum that "speech which creates a hostile or abusive working environment on the basis of race or sex" is unprotected). See also Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 613 ("First amendment law contains several categories of speech that are subject to ban or regulation even though they are viewpoint-based. . . . [T]he most obvious example can be found in labor law"); Post, *Correspondence, The Perils of Conceptualism: A Response to Professor Fallon*, 103 HARV. L. REV. 1744, 1746 (1990) ("speech that is appropriately protected when it occurs within public discourse is also appropriately regulated as racial or sexual harassment when it occurs within the context of an employment relationship").

In an article devoted entirely to the topic of first amendment implications of racist and sexist speech, the complete discussion of workplace harassment is as follows:

When racist and sexist speech is part of a transactional setting, such as harassment in the workplace, it may be regulated. The only First Amendment inquiry is into the bona fides of the purported transactional rationale. As long as we are satisfied that the rule is indeed genuinely transactional, it normally will be upheld.

Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 197 (1990). While that argument may be correct as applied to settings that are truly transactional, such as *quid pro quo* harassment, it is not correct as applied to hostile-environment harassment. There is a qualitative difference between prohibiting attempts to barter sex for job benefits and prohibiting speech that is deemed offensive.

194. *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 373, 159 N.E. 173, 174 (1927).

195. 395 U.S. 575 (1969).

the bargaining order because the company president had made truthful statements during the union's organizing drive to the effect that selection of the union could lead to the closing of the employer's plant or a transfer of operations if the union called a strike. The Court reasoned that "an employer's rights cannot outweigh the equal rights of the employees to associate freely" and that because of the disparity in power between employers and employees even relatively moderate truthful statements could be perceived as coercive.¹⁹⁶ As a result, the Court held that the employer's right to expression could be limited to predictions that are "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control."¹⁹⁷

The reasoning of *Gissel* does not support a general governmental right to regulate speech in the workplace. Regulation in the context of representation elections is justified by the "strong governmental interest in certain forms of economic regulation, even though such regulation may have an *incidental effect* on the rights of speech and association."¹⁹⁸ Regulation is intended to maintain the balance between labor and management by prohibiting speech that may be deemed threatening or coercive.¹⁹⁹

The speech prohibited by *Gissel* is analytically similar to blackmail. That is, the employer and the blackmailer both say, "If you don't do X (vote no; pay me money), I will do Y (close the plant; reveal your secrets)." The employer

196. *Id.* at 618 ("a threat of retaliation based on misrepresentation and coercion . . . [is] without the protection of the First Amendment").

197. *Id.*

The Court's decision in *Gissel* suffers from several inadequacies. For example, the Court did not explain why the employer's right to express himself free from government interference—a fundamental constitutional right—is only "equal" to the employees' right to associate free from private interference—which is, after all, only a statutory right. More fundamentally, the Court provided little justification for the Board's position that a representation election must be conducted under "laboratory" conditions. As Julius Getman has argued, "The laboratory conditions doctrine rests ultimately upon the assumption that free choice is fragile—that it will be undermined by the type of robust debate encouraged by the first amendment in other areas." Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 12 (1984).

198. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982) (emphasis added).

199. The Court has also upheld restrictions on union speech in the form of picketing and secondary boycott, both of which the Court has also tended to view as coercive. See *Bakery & Pastry Drivers & Helpers, Local 802 v. Wohl*, 315 U.S. 769, 776-77 (1942) ("Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated"); *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 616 (1980) (quoting *Electrical Workers v. NLRB*, 341 U.S. 694, 705 (1951)) ("Congress may prohibit secondary picketing . . . [which] spreads labor discord by coercing a neutral party to join the fray").

In other labor settings, robust expression has been the rule. For example, in the context of a labor dispute, the Court has recognized that language is "often vituperative, abusive, and inexact." See *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 283 (1974) (federal labor law, based on principles of the first amendment, "gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point"); see also *id.* (Douglas, J., concurring) (arguing that it is not federal labor law, but the first amendment, that gives unions that right). Cf. *Nash v. Texas*, 632 F. Supp. 951, 956 n.1 (E.D. Tex. 1986) (striking down the Texas mass picketing statute which prohibited "insulting, threatening, or obscene language" used "to interfere with, hinder, obstruct, intimidate" or to seek to do the same to another person "in the exercise of his lawful right to work" on the ground that it prohibited more than fighting words).

and the blackmailer may have every right to do "Y,"²⁰⁰ but the government may prohibit the transaction—the exaction of X as the price of forbearance. While such reasoning does support regulation of *quid pro quo* harassment claims—where the employer is saying, in effect, "If you don't sleep with me, I will fire you"—it does not support regulation of offensive speech.²⁰¹

Offensive speech is quite different from the speech involved in the labor cases. Far from having an "incidental effect" on the right of speech, regulation of offensive speech has as its primary purpose the limitation of "offensive" expression, often in the form of "offensive" ideas, that has no relation to any threat of future action. Although advocates of such regulation may argue that there is no desire to censor ideas, only to guarantee equal participation of women or blacks in the workplace, the fact remains that the purpose of the regulation is to prohibit expression because of the ideology expressed.

Even if the reasoning of *Gissel* could be extended to some offensive speech in the workplace, it is difficult to see how it could be extended to cases involving harassment by coworkers. *Gissel* relied heavily on the inequality of power between employer and employee to justify the restriction on employer expression. Harassment by coworkers, or, a fortiori, subordinates, does not involve such an imbalance in power.

Robert Post has suggested a somewhat different justification for limiting speech in the workplace.²⁰² Although he argues that limitations on racist speech in "public discourse" are highly suspect, he asserts that speech in the workplace does not generally constitute public discourse.²⁰³ Post defines "public discourse" as "encompassing the communicative processes necessary for the formation of public opinion, whether or not that opinion is directed toward specific governmental personnel, decisions, or policies."²⁰⁴ However, asserts Post, "within the workplace...an image of dialogue among autonomous self-governing citizens would be patently out of place."²⁰⁵

Post's argument seems to presuppose that the communication contributing to public opinion is largely limited to the press, handbillers on public streets, and fiery orators in the parks. Yet, for most citizens—who are not political activists—the great bulk of their discussion of political and social issues probably occurs in the home and the workplace. For example, there are probably very few workers in the United States who did not discuss the Gulf War while

200. See, e.g., *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 273-74 (1965) ("when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice").

201. The court in *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794, at *155 (M.D. Fla. 1991), mistakenly asserted that "the speech at issue is indistinguishable from the speech that comprises a crime, such as threats of violence or blackmail . . .," an assertion facilitated by the court's belief that the speech was not protected because it constitutes "discriminatory conduct in the form of a hostile work environment." As discussed below, see *infra*, text accompanying notes 250-54, *infra*, speech does not become "conduct" simply because it has effects. After all, the only reason that anyone would want to regulate any speech is the perception that the speech produces tangible adverse consequences.

202. See Post, *supra* note 2.

203. *Id.* at 289 nn. 112-13.

204. *Id.* at 288.

205. *Id.* at 289.

at work. Presumably, Post would argue for protection of those discussions under the first amendment, and I would hope he would do so even if the discussions offended workers having Iraqi citizenship. If he would protect those discussions, it is difficult to understand why he would withdraw similar protection for speech that conveys ideas offensive to women and minorities.

Post's suggestion that workplace speech is not public discourse places too much emphasis on where the speech takes place and too little emphasis on the content of the speech. As Post acknowledges, "[s]peech that can be said to be about matters of 'public concern' is ordinarily classified as public discourse."²⁰⁶ It should not lose the protection of the first amendment simply because someone chose to express it on private property.

In sum, the term "workplace" is not a talisman that extinguishes first amendment protections. Just as schoolchildren "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"²⁰⁷ workers do not shed theirs at the factory gate.²⁰⁸ The Supreme Court has narrowly limited the circumstances in which expression in the workplace may be regulated, and those circumstances have no relevance to hostile-environment harassment cases.

B. *Captive Audience*

A separate justification, though related to the labor speech argument, is that limitations on offensive speech in the workplace are justified because employees constitute a captive or unwilling audience and therefore lack the freedom that they would enjoy on the street to avoid the offensive speech.²⁰⁹ Heightened restrictions on expression could therefore be warranted to protect them.²¹⁰ However, the Supreme Court's captive-audience cases do not reach this far.

206. *Id.* at 288.

207. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969).

208. Paradoxically, the government has been permitted less leeway in regulating the speech of public-sector employees—where it is acting in its capacity as an employer—than it has been accorded in regulating the speech of private-sector employees—where it is acting in its capacity as a regulator. It is difficult to understand how the state acting as regulator can forbid the statement that "niggers ought to be shot like [Vernon Jordan] was," see *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244 (N.D. Ind. 1985), when the government acting as employer cannot forbid an employee's statement that she hopes the next attempt on the president's life is successful, see *Rankin v. McPherson*, 483 U.S. 378 (1987). Put another way, it is difficult to understand why an employer in the private sector *must* punish such speech, while an employer in the public sector *must not*.

209. Strauss, *supra* note 1, at 5 ("Employees at work constitute a captive audience and the state has an interest in protecting these individuals from unwanted and unavoidable exposure to noxious ideas"); Delgado, *supra* note 3, at 174; Abrams, *supra* note 86, at 1212 n.118:

Pornography in the workplace may be far more threatening to women workers than it is to the world at large. . . . Moreover, while publicly disseminated pornography may influence all viewers, it remains the expression of the editors of *Penthouse* or *Hustler* or the directors of *Deep Throat*. On the wall of an office, it becomes the expression of a coworker or supervisor as well.

210. In *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794, at *158 (M.D. Fla. 1991), the court held that harassing speech could be regulated under the captive-audience doctrine, but its entire doctrinal discussion was the following:

The free speech guarantee admits great latitude in protecting captive audiences from offensive speech. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); *FCC v. Pacifica Found.*, 438 U.S. 726, 744-51

The Supreme Court has been most receptive to the captive-audience argument in the context of the home.²¹¹ For example, in *Frisby v. Schultz*,²¹² the Court upheld an ordinance prohibiting focused picketing in front of a particular residence as a valid time, place, and manner regulation. The Court observed that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."²¹³ However, before deciding that this interest of the "highest order" was legitimately being protected, the Court first went to some length to demonstrate that the ordinance was content neutral.²¹⁴ The Court similarly recognized the sanctity of the home in *Rowan v. United States Post Office Department*,²¹⁵ which upheld a statute permitting persons having received "pandering advertisements" for "erotically arousing or sexually provocative" materials to request the Post Office to require mailers to stop future mailings to the addressee. Rejecting a first amendment challenge based upon the mailers' right to communicate with the unwilling addressee, the Court relied on the "individual autonomy" of the householder, stating: "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere."²¹⁶

Some commentators have relied upon *Lehman v. Shaker Heights*²¹⁷ for the principle that the government may protect employees in the workplace on a captive-audience theory.²¹⁸ In *Lehman*, the Court affirmed a city rule against political advertising on city-owned buses. After noting that buses are not public forums and that the city was acting in its proprietary capacity, the Court held

(1976) (plurality opinion); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (plurality opinion).

211. See *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) ("Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different") (citation omitted).

212. *Id.*

213. *Id.* at 484 (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)).

214. Those challenging the ordinance argued that because of a state law protecting labor picketing, there must be an implied exception to the ordinance for labor picketing. 487 U.S. at 481. Under *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972), an ordinance prohibiting picketing generally but singling out labor picketing for protection is a content-based restriction. The Court in *Frisby* rejected the contention that an implied exception existed and thus found the ordinance content neutral.

215. 397 U.S. 728 (1970).

216. *Id.* at 738. On the "captive audience" point, the Court in *Cohen v. California*, 403 U.S. 15, 21 (1971) recognized in dictum the special status of the home: "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue."

The Court has also upheld restrictions on the use of sound trucks, upholding an ordinance banning amplification devices emitting "loud and raucous noises" on vehicles. *Kovacs v. Cooper*, 336 U.S. 77 (1949). That ordinance was justified by "the need for reasonable protection in the homes or business houses from the distracting noises" of such vehicles. *Id.* at 89. On the other hand, in *Saia v. New York*, 334 U.S. 558 (1948), the Court struck down an ordinance requiring prior approval of the police chief to operate sound trucks on the ground that the regulatory system allowed the police chief unbridled discretion to deny a permit because of the content of the ideas expressed.

217. 418 U.S. 298 (1974).

218. See Strauss, *supra* note 1, at 12-13; Note, *Verbal Sexual Harassment on the Job as Intentional Infliction of Emotional Distress*, 17 CAP. U.L. REV. 245, 268 (1988) ("if the first amendment does not prohibit a state from banning a benign political message to a captive audience on a bus, it is difficult to conceive how it could preclude a state from attempting to control hostile and injurious messages to a captive audience in the workplace").

that the city's interest in avoiding appearances of endorsement and in protecting riders from "the blare of political propaganda" justified the ordinance.²¹⁹ The Court also pointed to the practical problems of a contrary ruling, which would turn displays in all public buildings into "Hyde Parks open to every would-be pamphleteer and politician."²²⁰

Lehman does not support the argument that because employees are a "captive audience," speech directed toward them is entitled to reduced protection. In *Lehman* the city was acting in its proprietary, rather than its regulatory, capacity. *Lehman* might have provided some support if it had approved a city regulation prohibiting political advertising in privately owned buses. In such a case, the ordinance would not be supported by the city's attempt to avoid appearances of endorsement or by the concern that all public displays would be converted into public forums. Instead, the ordinance would be supported only by the government's interest in protecting its citizens from the "blare of political propaganda," plainly an invalid governmental interest. If *Lehman* authorizes governmental regulation of harassing speech in the private workplace, it must similarly provide support for regulation of *political* speech in the private workplace, which, after all was the form of speech involved in that case. However, it seems inconceivable that the first amendment would allow a state to prohibit employees from engaging in political speech in the private workplace under a captive-audience rationale.²²¹

A critical distinction between the prohibition in *Lehman* and prohibitions of racially and sexually offensive speech is that, though content based in that it distinguished between political and nonpolitical speech, the regulation in *Lehman* was viewpoint neutral: it prohibited all political advertising. The harassment cases, on the other hand, are selective in terms of the viewpoints that are prohibited and are more analogous to a ban on political advertising by extremist candidates but not by mainstream candidates.²²²

The underinclusiveness of the hostile-environment harassment ban—that is, its limitation to only certain forms of offensive speech—also casts doubt on its entitlement to the captive-audience exception. In *Erznoznik v. Jacksonville*,²²³

219. 418 U.S. at 304.

220. *Id.*

221. *But see* Strauss, *supra* note 1, at 35 ("Even political speech cannot be forced on an unwilling listener when the listener is captive"). *Cf.* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (upholding Hatch Act, which restricts the right of federal employees to participate in partisan political activity).

Strauss' argument seems to be based on the incorrect assumption that if a listener cannot avoid speech, the government may step in to regulate it. However, the Supreme Court in *Erznoznik v. Jacksonville*, 422 U.S. 205, 210 (1975), addressed that contention in words equally applicable to the present discussion:

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." *Rowan v. Post Office Dep't.*, 397 U.S. 728, 736 (1970). Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.

222. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-19, at 950 n.24 (observing that "the concept of a 'captive audience' is dangerously encompassing, and the Court has properly been reluctant to accept its implications whenever a regulation is not content-neutral").

223. 422 U.S. 205 (1975).

the Court struck down an ordinance prohibiting the exhibition of films containing nudity on drive-in movie screens visible from a public street. The Court rejected the city's claim that its goal was to further the goal of traffic safety, because the city did not aim to protect citizens from all movies that might distract motorists; instead, it singled out films containing nudity.²²⁴ Similarly, regulation of harassment cannot be justified on the basis that it attempts to shelter workers from offensive speech in the workplace, since it singles out racial and sexual offense, and leaves other forms of offense unregulated.²²⁵

None of the captive-audience cases supports suppression of speech that is deemed "harassing" under Title VII because none of these cases involves suppression of speech because of the government's disagreement with the idea expressed or the government's belief that the message was inherently harmful.²²⁶ In the harassment context, comments to the effect that women and blacks are equal and entitled to equal respect in the workplace are permitted; comments expressing the contrary view are not. No "captive audience" precedent comes close to supporting such regulation.

The captive-audience doctrine, based as it is on the notion that there are spheres in which the state may protect against intrusions, does not support insulation from speech by others having an equal right to be present. A householder's claim to exclude unwanted mail from distributors of pornographic material stands on a very different footing from a worker's claim to exclude unwanted speech by his coworkers. Indeed, the worker's claim is more similar to a wife's claim of a right to exclude pornographic material that her cohabiting husband wishes to bring in the house, but it is doubtful that a state could enforce the wife's claim under the captive-audience doctrine.²²⁷ Similarly, by analogy to *Lehman*, allowing a captive-audience claim by the worker would be

224. *Id.* at 215.

225. Smolla suggests that underinclusion does not render a statute a content-based restriction, arguing that a fighting-words statute that singled out racist and sexist speech would simply "narro[w] the range of prosecution from a larger set of proscribable speech." Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 199 n.104 (1990). The assumption that the greater power includes the lesser is a faulty one when the claim is that a statute discriminates—against speech or anything else. It is a general characteristic of content-based restrictions that they restrict less speech than broader, yet permissible, content-neutral restrictions. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197 (1983).

In support of his argument, Smolla asserts that a fighting-words statute restricting only racist and sexist words would be analogous to an obscenity statute that banned obscene films but not obscene books and magazines, but the fallacy of the argument is obvious. A distinction between books and films is not a content-based distinction; rather, it is based upon the medium of expression. If Smolla's "greater includes the lesser" argument is truly valid, the state would have the power to ban obscene films having an anti-democracy message, while allowing such films with a pro-democracy message, which it plainly does not. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (suggesting in dictum that *F.C.C. v. Pacifica*, 438 U.S. 726 (1978), would not have sustained "a regulation prohibiting scatological descriptions of Republicans but not scatological descriptions of Democrats").

226. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985) (captive audience doctrine "does not permit a government to discriminate on account of the speaker's message"), *aff'd*, 475 U.S. 1001 (1986).

227. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 741 (1970) (Brennan, J., concurring) (noting that the Court was leaving open the constitutionality of the statute's provision allowing a householder to stop mailings to the householder's children under the age of 19 and suggesting that the provision raised "constitutional problems").

equivalent to an ordinance prohibiting the expression of political views by *fellow passengers* on a municipal bus.

One's readiness to extend the captive-audience doctrine may ultimately depend upon one's views on free will, a topic beyond the scope of this Article. However, even if one believes that individuals have little control over their lives and are thus "captives" wherever they might be, prudence dictates restraint in incorporating that world view into first amendment doctrine. If expression may be limited whenever we are captive, a broad view of captivity results in a very narrow scope of free expression. That scope is even narrower if even a mild burden on the listener to avoid the speech is perceived as unduly burdensome.²²⁸ We have already learned that we are captives in our homes, where even working people may spend more than half their time, but that determination was based upon the status of the home as "the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits."²²⁹ Extension of the captive-audience doctrine to the workplace, where workers often spend one-third to one-half of their waking hours, would leave very little time when we are not captives for first amendment purposes, leaving correspondingly little time for the free expression that under our system is supposed to be the rule rather than the exception.²³⁰ As the Supreme Court has recognized, the ability to avoid intrusions is "a special benefit of the privacy all citizens enjoy within their own walls."²³¹ A wholesale extension of the captive-audience principle is likely to reduce its strength in the home, where it is needed most, both because the doctrine is likely to be weakened to accommodate other settings and because alternative channels of communication will be thereby reduced.²³²

C. Time, Place and Manner Regulation

Another way potentially to justify regulation of sexual and racial harassment in the workplace is to view the regulation as a simple regulation of the time, place, or manner of expression.²³³ Time, place, and manner regulations

228. For example, in discussing the obligation on the part of women who object to the posting of sexual pictures in the workplace, Strauss argues that "having to take a circuitous route from her desk to the restroom to avoid a picture would be too significant a burden on the woman employee.") Strauss, *supra* note 1, at 49 n.189.

229. *Frisby v. Schultz*, 487 U.S. at 484 (quoting *Carey v. Brown*, 447 U.S. 455 at 471).

230. See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 513 (1969) ("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.").

231. *Id.*

232. Perhaps the obvious point should be noted that it is not in the economic interest of employers to tolerate behavior by their employees that substantially compromises the ability of other employees to perform their jobs. See Waks & Starr, *The "Sexual Shakedown" in Perspective: Sexual Harassment in its Social and Legal Contexts*, 7 EMPLOYEE REL. L.J. 567, 570-71 (1982) (sexual harassment "adversely affects morale, reduces productivity, and increases the rate of absenteeism [and job turnover] among affected employees"). See also U.S. Merit Systems Protection Board, *Sexual Harassment in the Workplace: Is it a Problem?* 76 (1981) (sexual harassment costs the federal government \$95 million per year in the kinds of indirect costs described above). Although some employers may tolerate such behavior, most will not, at least not in its extreme forms. Thus, employees may be captives in the job market, but they are not necessarily captives to offensive speech.

233. See *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794, at *156-57 (M.D. Fla. 1991) (holding that "regulation of discriminatory speech in the workplace constitutes nothing more than a time, place, and manner regulation of speech"). The court quoted Strauss, *supra* note 1, at 46, for the proposition that "[b]anning sexist speech in the workplace does not censor such speech everywhere and for all time."

are valid if they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."²³⁴ The argument would be that employees may continue to express offensive views either by limiting their expression to places outside the workplace or, possibly, by expressing the same thoughts in the workplace but in a less graphic or offensive manner.²³⁵

Restrictions on offensive speech immediately run up against the objection that they are not content-neutral. As discussed above, they are not only content-based, but viewpoint-based as well. Although Geoffrey Stone has correctly argued that limitations on profanity are more properly considered time, place and manner restrictions rather than content-based restrictions,²³⁶ that analysis does not extend to the kind of regulation discussed in this Article. No word is per se prohibited in the workplace; certain words are prohibited only in the context of a particular sociopolitical meaning. Opponents of expression deemed harassing cannot honestly say "it is not your message that I object to, only the particular words you have chosen to convey it."

It is also difficult to view harassment regulation as being narrowly tailored to serve a significant governmental interest. Whatever justification there might be for regulating the more egregious forms of harassment is unlikely to extend to prohibiting a nude picture on a toolbox, a plaque stating "Even male chauvinist pigs need love," or references to women as "broad." Moreover, "ample alternative channels of communication" do not exist. Workers spend a large proportion of their time in the workplace, and for all of that time, no alternative channels of communication exist.

There is a limited circumstance in which the Court has been willing to analyze content-based restrictions as time, place, and manner restrictions. These are cases where the regulation is directed not at the speech itself, but rather at its "secondary effects." The argument has been made that failing to regulate harassing speech disadvantages women and minorities by lowering their self-esteem and interfering with their ability to perform their jobs.²³⁷ Regulation of expressions of prejudice or "dirty jokes" is not based upon disagreement with the content of the message, the argument would go, but rather is based upon the "secondary effects" of the expression—the concrete harm to the employment opportunities of women and minorities—and is therefore permissible

234. *United States v. Grace*, 461 U.S. 171, 177 (1983).

235. See Wright, *Racist Speech and the First Amendment*, 9 MISS. COLL. L. REV. 1, 19 n.111 (1988) ("Most instances of the use of racial epithets, even if thought to at least imply some social idea, seem susceptible of reformulation so as to express pungently the speaker's contempt, animosity, or resentment without the use of racial epithets").

236. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 243 (1983) (although restrictions on use of profanity are in literal sense content based, functionally they are more similar to restrictions on the manner of expression than on the content of expression). See also Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 628 n.128 (1982) ("Even if a 'stream of obscenities' were fully protected by the first amendment, legitimate 'time, place, and manner' regulations could be imposed").

237. See, e.g., Strauss, *supra* note 1, at 14 ("sexist speech reinstitutionalizes barriers in the workplace based on gender. When women subjected to sexist speech leave the job, or persist but with decreased productivity, it serves to perpetuate male dominance in the workplace").

under *Renton v. Playtime Theatres, Inc.*²³⁸ However, even assuming the correctness of the premise that expressions of prejudice or sexual jokes unaccompanied by discriminatory action somehow diminish employment opportunities, *Renton* provides slim authority for their regulation.

Renton involved a challenge to a zoning ordinance prohibiting adult motion picture theaters from locating within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.²³⁹ The City of Renton defended the ordinance on the ground that it was intended to prevent crime, protect the city's retail trade, maintain property values, preserve the quality of city neighborhoods, and generally protect the quality of life.²⁴⁰ The Supreme Court upheld the ordinance as a "content-neutral" time, place, or manner regulation that is "justified without reference to the content of the regulated speech."²⁴¹ Relying on the plurality opinion in *Young v. American Mini Theatres, Inc.*,²⁴² the Court stated that a distinction between adult theaters and other kinds of theaters could properly be made "without violating the government's paramount obligation of neutrality in its regulation of protected communication."²⁴³ It is only the "secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive speech.'"²⁴⁴

Unlike the ordinance in *Renton*, which sought to regulate adult movie theaters without reference to any "viewpoint" that might be expressed in the films,²⁴⁵ sexual harassment regulations prohibit speech primarily on the basis of the viewpoint expressed. An employee's work performance may be seriously affected by his coworkers' telling him daily that he is the illegitimate offspring of a diseased prostitute, but he is entitled to no protection. An employee may be similarly offended by continual expressions of feminist viewpoints in the workplace. Such employees, however, are without recourse under Title VII.

The difficulty with reliance on *Renton* is that if the reaction of the audience is considered a "secondary effect" of expression, then virtually any restriction of expression can be justified. The state's primary interest in regulating speech is seldom the stifling of expression in the abstract; that is, restrictions on

238. 475 U.S. 41 (1986).

239. *Id.* at 43.

240. 475 U.S. at 48.

241. See also *Roberts v. United States Jaycees*, 468 U.S. 609, 623-24 (1984) (upholding application to Jaycees of a state statute banning sex discrimination in public accommodations because it did not "aim at the suppression of speech" or "distinguish between prohibited and permitted activity on the basis of viewpoint," and furthered a goal "unrelated to the suppression of expression").

242. 427 U.S. 50 (1976). In *Young*, the Court upheld a Detroit zoning ordinance requiring dispersal of "adult" theaters and bookstores against a contention that this was a content-based restriction of speech. Although acknowledging that the restriction was based upon content, the Court emphasized that the ordinance was viewpoint neutral. *Id.* at 70 ("the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same").

243. 475 U.S. at 49 (quoting *Young*, 427 U.S. at 70).

244. *Id.*

245. Other than the "implicit, if not explicit, message in favor of more relaxed sexual mores." Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 111-12 (1978).

expression are not generally justified by their impact on the *speaker*.²⁴⁶ Instead, speech is usually regulated because of a conclusion that it is better for society that listeners not hear the speech because of its detrimental effect on them—for example, the listener may become violent, the listener may believe false statements of fact, national security may be compromised by the speech, or the speech may undermine the moral fabric of society. Under a broad definition of “secondary effects,” prohibition of speech urging overthrow of the government could be justified on the basis that some people might be inclined to attempt a violent overthrow of the government even if there is little likelihood that such an attempt is imminent. The government interest in suppressing speech because it is offensive to the listener can in no sense be said to be an interest “unrelated to the suppression of free expression”;²⁴⁷ instead, its interest is in protecting the listener from the expression of the speaker.²⁴⁸ Thus, the listener’s reaction to speech must be a “primary effect” of speech, rather than a “secondary effect,” unless *Renton* is interpreted to repudiate a half-century of first amendment jurisprudence.²⁴⁹

The attempt to distinguish between the speech itself and the effects of the speech is untenable. For example, Marcy Strauss suggests a distinction between “speech that discriminates” and “speech that advocates discrimination.”²⁵⁰ “[S]peech that discriminates” we are told, occurs “when the message causes women to leave their jobs, or to suffer impediments at work that men need not endure.”²⁵¹ The distinction, according to Strauss, is that discriminatory speech causes “direct and immediate” harm, while the harm of speech advocating discrimination is more “speculative.”²⁵² Strauss’ argument is a formalism analo-

246. But see Delgado, *supra* note 3, at 176 (“[B]igotry, and thus the attendant expression of racism, stifles, rather than furthers, the moral and social growth of the individual who harbors it”).

247. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

248. The reliance on *Renton* in *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794, *157-58 (M.D. Fla. 1991), is puzzling. The court simply cites *Renton* for the conclusion that “[t]o the extent that the regulation here does not seem entirely content neutral, the distinction based on the sexually explicit nature of the pictures and other speech does not offend constitutional principles.” However, the court’s discussion of the harassment standard makes clear that it is not imposing liability solely on the basis of the existence of sexually explicit pictures and language without regard to the message that is conveyed. For example, one of the court’s findings of fact was that only pictures of women had been posted, implying that the analysis might be affected if pictures of both men and women were posted. Also, the court’s acceptance of the view that the evil of pornography in the workplace is that it “communicates a message about the way [the employer] views women,” *id.* at 124, shows that it is not sexual explicitness in itself that provides the basis for regulation. Moreover, not all of the speech that the court finds harassing is even sexually explicit. Part of the harassing speech included use of terms such as “honey,” “dear,” “baby,” “sugar,” and “momma,” *id.* at 27, and statements such as “women are only fit company for something that howls” and “there’s nothing worse than having to work around women,” *id.* at 28.

249. See, e.g., *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85 (1977) (prohibition of “For Sale” signs was based upon the Township’s fear of “their ‘primary effect—that they will cause those receiving the information to act upon it.’”). See also Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & POL. REV. 130 (1984) (“The core element in first amendment theory is that the impact of speech—whether considered good, bad or indifferent—cannot be invoked as a basis for governmental control of speech”).

250. Strauss, *supra* note 1, at 39. See also Delgado, *supra* note 3, at 164 (“the use of a racial insult against a member of a minority group is race discrimination”).

251. Strauss, *supra* note 1, at 39.

252. *Id.* at 40. It is difficult to accept Strauss’ assertion, that regulation of “speech that discriminates” is “viewpoint-neutral,” *supra* note 1, at 39. She says that “[i]t does not matter whether the speaker tells the woman that she belongs in the bedroom or in the boardroom; a judgment need not be made about which statement, if

gous to labelling speech as "conduct."²⁵³ The distinction for Strauss is simply that "discriminatory speech" has an unattractive effect, but that is not a basis for treating it as an unprotected class of expression.²⁵⁴

No one disputes that harm can flow from much of the expression regulated in harassment cases. However, the fact that some harm may flow from speech is not adequate justification for regulating it. Opponents of virtually any ideology deemed offensive enough that some want to ban its dissemination can point to a risk of concrete harm. Many believe that advocating the violent overthrow of the government creates a serious risk of harm—some may actually try it, while others may react to the message violently. Others believe that burning the flag is an "evil and profoundly offensive" action²⁵⁵ that will tarnish its value as a symbol of this nation and its ideals. Still others believe that criticism of a war being waged by the United States lends aid and comfort to the enemies and enhances the risk of harm to our fighting forces. Rejection of attempts to regulate such expression does not depend upon rejection of the premise that some harm may flow from it, but rather from the conclusion that the value of free expression is sufficiently high that the risk of harm must be tolerated.²⁵⁶ These

either, subordinates or degrades women." *Id.* Yet how can suggesting to a woman that she belongs in the boardroom cause her to leave her job or to suffer impediments that men need not endure? Presumably, Strauss is not suggesting that a speaker could be exposed to liability for making such a supportive comment.

253. See *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (the slogan on Cohen's jacket was "mainly conduct and little speech").

Expression is not converted into conduct simply because it has effects. See *State Div. of Human Rights v. McHarris Gift Center*, 52 N.Y.2d 813, 418 N.E.2d 393, 436 N.Y.S.2d 878 (1980), *aff'g* 71 A.D.2d 813, 419 N.Y.S.2d 405 (1979) (ruling four to three that display of Polish joke items, such as coffee cups with the handles on the inside, does not deny equal access to stores to people of Polish descent). But see Justice Jasen's dissent where he states that such materials "contribute to the creation and maintenance of prejudicial beliefs and discriminatory behavior" and violate "the fundamental right of all ethnic and racial groups to be free of the adverse effects of intentional ethnic or racial discrimination and ridicule." *Id.* at 816-17, 418 N.E.2d at 394-95, 436 N.Y.S.2d at 879-80.

254. Many of the arguments made in support of regulation of offensive speech in the workplace are the same as those made by supporters of feminist anti-pornography statutes, who also point to the adverse impact on attitudes and actions created by the speech they seek to regulate. The anti-pornography statutes have defined pornography in ideological terms: "sexually explicit material that depicts women as sexual objects whose essential nature is fulfilled by providing sexual pleasure to men." In attempting to defend a pornography ordinance adopted by the City of Indianapolis, the City argued that it served the function of altering the socialization of men and women and would "play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it." *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). In striking down the ordinance, the Seventh Circuit identified it as a viewpoint-based restriction that distinguished between sexually explicit material premised on equality and sexually explicit material premised on domination. *Hudnut*, 771 F.2d at 325. According to the court, "[t]he Constitution forbids the state to declare one perspective right and silence opponents." *Id.*

Just as the Indianapolis ordinance weighed in on one side of what might be called the equality/dominance issue, regulation of sexist, sexual, and racist speech in the workplace takes a position on the function and status of the races and sexes. A worker may have magazines in the workplace, as long as they are not the like of *Playboy*, which "evoke[s] and confirm[s] the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy." *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 627 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (Keith, J., dissenting). A feminist tract, no matter how contemptuous of men, would likely be beyond the reach of the statute.

255. *Texas v. Johnson*, 109 S. Ct. 2533, 2555 (1989) (Rehnquist, C.J., dissenting).

256. It is not even clear that the desire to suppress racist and sexist speech is truly based upon a desire to eliminate harm to the object of the slur. For example, in an article arguing for criminalization of racist speech, Mari Matsuda declines to repeat racial slurs not just "to avoid harm to others," but "to prevent desensitization to

ideas cannot be converted from protected speech to unprotected speech simply by labelling the harm a "secondary effect."

In sum, it is not the "secondary effects" of the offensive speech that is the basis for the regulation. Instead, the basis for the regulation is its "primary effect"—the impact of the speech on the audience. Thus, advocates of regulation will have to look elsewhere for justification.

D. *Defamation and Group Libel*

Defamation, like obscenity, is entitled to reduced first amendment protection. Just as a few reported harassment decisions involve statements that qualify as fighting words or obscenity, a few involve statements that are defamatory in the traditional sense. For example, statements made to or in the presence of others that a particular woman is a "whore" could be considered defamatory to the extent that the statement is reasonably susceptible of its ordinary meaning.²⁵⁷ On the other hand, a statement that "all women are whores" would not generally be considered defamatory.²⁵⁸ However, very few cases present facts where traditional defamation law would apply.

More significant is the question whether some recovery is constitutionally permissible for statements that fall within the category of "group libel." Under the reasoning of *Beauharnais v. Illinois*,²⁵⁹ some statements disparaging blacks or women as a group arguably lie outside the scope of constitutional protection. *Beauharnais* upheld a conviction under an Illinois group libel law, which provided:

It shall be unlawful . . . to . . . publish . . . any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy. . . .²⁶⁰

The defendant had been charged with violating the statute by circulating a leaflet urging the Mayor and City Council "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro. . . ."²⁶¹ The publication also stated: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana

harmful words" Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2329 n.49 (1989). In other words, she affirmatively desires that slurs continue to offend, apparently because if they no longer offend, i.e., "harm," they may no longer be suppressed.

257. See RESTATEMENT (SECOND) OF TORTS § 574 & comment C.

258. *Biggerstaff v. Zimmerman*, 108 Colo. 194, 114 P.2d 1098 (1941); See also *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284-86 (1974) (holding that use of the term "traitor" to describe employees who refused to join union could not be construed as a representation of fact; rather the statement was "merely rhetorical hyperbole").

259. 343 U.S. 250 (1952).

260. *Id.* at 251.

261. *Id.* at 252.

of the negro, surely will."²⁶² Attached to the leaflet was an application for membership in the "White Circle League of America, Inc."²⁶³

The Supreme Court provided two justifications for upholding the conviction. The first justification was *Chaplinsky's* suggestion that epithets and personal abuse are not protected by the Constitution.²⁶⁴ The second was the assertion that because defamation of individuals is not constitutionally protected neither is defamation of groups.²⁶⁵ Neither of these justifications has withstood the test of time. First, under current doctrine, epithets and personal abuse are protected by the Constitution unless they create an imminent risk of breach of the peace.²⁶⁶ Second, twelve years after *Beauharnais*, the Supreme Court held in *New York Times Co. v. Sullivan*²⁶⁷ that the first amendment does indeed place substantial limitations on governmental power to punish defamation of individuals. Although the Supreme Court has not overruled *Beauharnais*, both lower courts²⁶⁸ and commentators²⁶⁹ have questioned its continuing vitality.²⁷⁰ Given the close resemblance between the kind of group libel involved in *Beauharnais* and the advocacy of unpopular social views, there is little reason to think that the Court would permit such regulation today.

E. *Fighting Words*

In *Chaplinsky v. New Hampshire*,²⁷¹ the Supreme Court described a category of speech that lies outside the protection of the Constitution: "the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."²⁷² It could be argued that many of the comments in sexual harassment cases fall within the broadest reading of this definition; that is, they are "insulting" words that "by their very utterance inflict injury," if "injury" in this context means "hurt feelings" or "offense."

262. *Id.*

263. *Id.*

264. *Id.* at 257.

265. *Id.* at 258.

266. See *infra* notes 271-81 and accompanying text.

267. 376 U.S. 254 (1964).

268. *American Booksellers Ass'n Inc. v. Hudnut*, 771 F.2d 323, 331 n.3 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

269. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 330 (1988) (*Beauharnais* is "damaged goods"); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 925-26 (3d ed. 1985).

270. But see *Smith v. Collin*, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting) (arguing that the lower court decision was "in some tension with *Beauharnais* [which] has not been overruled or formally limited in any way").

There are other aspects of *Beauharnais* which make it clear that even if the Court were willing to accept the general principle that derogatory untrue statements of fact about racial groups could be actionable, the current Court would not sustain the conviction in that case. First, the leaflet involved a matter of political concern; indeed, it contained a petition for governmental action. Second, some of the statements may have been objectively true. However, the Court approved the portion of Illinois law that required that for the defense of truth to prevail, not only must truth be shown, but it must also be shown that it was published "with good motives and for justifiable ends," *Beauharnais v. Illinois*, 343 U.S. at 265-66. Finally, some of the statements were almost certainly protected "opinion."

271. 315 U.S. 568 (1942).

272. *Id.* at 572.

However, case law subsequent to *Chaplinsky* has narrowed the scope of this exception.²⁷³ Thus, in *Gooding v. Wilson*,²⁷⁴ a conviction under a Georgia statute prohibiting use of "opprobrious words or abusive language, tending to cause a breach of the peace" was overturned on the strength of the Court's conviction that the statutory terms "opprobrious" and "abusive" have a meaning broader than the term "fighting words."²⁷⁵ Under the Georgia statute, the Supreme Court concluded, a defendant could be convicted for using "harsh insulting language,"²⁷⁶ which was a result it believed incompatible with the first amendment. The Court also held that the statutory phrase "tending to cause a breach of the peace" was overbroad—as interpreted by Georgia courts—because it would constitute a breach of the peace "merely to speak words offensive to some who hear them"²⁷⁷ In *Lewis v. City of New Orleans*,²⁷⁸ the Court made clear that words "conveying or intended to convey disgrace" are not necessarily "fighting words."²⁷⁹ Thus, the supervisor who refers to women and blacks in general by such terms without regard to whether any women or blacks are present to hear the comments cannot be said to have uttered "fighting words,"²⁸⁰ although the supervisor who calls his subordinate "a fucking whore" or "a fucking nigger" may have.²⁸¹

Only a few harassment cases have involved expression that fits within the definition of "fighting words." Even in those cases, however, it is disingenuous to justify regulation of offensive speech on a fighting-words theory. The fighting-words doctrine is based upon the government's interest in preserving the peace.

273. See Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 635 (1985) (suggesting that *Cohen* altered *Chaplinsky* in three respects: (1) limiting the "circumstances under which a speech act could be considered fighting words"; (2) ignoring "*Chaplinsky's* notion of the harm some assaultive speech may inflict"; and (3) articulating an extreme moral skepticism or relativity of value[s] that is inconsistent with the basic normative logic of *Chaplinsky*); Heins, *Banning Words: A Comment on "Words that Wound"*, 18 HARV. C.R.-C.L. L. REV. 585, 588 (1983) ("despite its continuing references to *Chaplinsky* the Court will no longer permit convictions for uttering offensive words to stand, whether the words be insulting, racist, or otherwise abusive").

274. 405 U.S. 518 (1972).

275. *Id.* at 525. The defendant was an anti-war protester who was accused of saying to a police officer at a disturbance at an induction center, "White son of a bitch, I'll kill you," "You son of a bitch, I'll choke you to death," and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." *Id.* at 520 n.1.

276. *Id.* at 525.

277. *Id.* at 527. See also *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 547-48 (the "offensive character of an idea" to a recipient can never "justify an attempt to censor its expression").

278. 415 U.S. 130 (1974).

279. See also *Hammond v. Adkisson*, 536 F.2d 237, 239 (8th Cir. 1976) (overturning denial of habeas corpus for petitioner who was convicted under abusive-language statute for calling police "m. f. son-of-a-bitches" and "m. f. pigs" on ground that "words must do more than offend, cause indignation or anger the addressee to lose the protection of the First Amendment").

280. The extent to which sexual propositions might be considered fighting words is unclear. For example, one court held that the question, "How about some pussy?," to a 16-year-old girl in front of her five-year-old brother did not fall under the Georgia fighting-words statute. *Rozier v. State*, 140 Ga. App. 356, 231 S.E.2d 131 (1976). Another court held that the statement, "I bet your honey doesn't have the nine and one-half inch penis I have," might. *Lamar v. Banks*, 684 F.2d 714 (11th Cir. 1982) (remanding for evidentiary hearing on petition for habeas corpus). Although some sexual propositions may properly be viewed as fighting words, a more appropriate analysis would be under a privacy theory. See *infra* notes 291-98 and accompanying text.

281. See *United States v. Sturgill*, 563 F.2d 307, 310 (6th Cir. 1977) (holding unconstitutional a Kentucky harassment statute providing that "[a] person is guilty of harassment when with intent to harass, annoy or alarm another person he . . . in a public place, makes an offensively coarse utterance, gesture or display, or addresses abusive language to any person present . . .").

The purpose of regulating offensive speech is not to preserve the peace, but to protect members of protected groups from offense and thereby enhance their employment opportunities. It is the absence of *any* effective response by the victim (*i.e.*, a lack of power) that underlies harassment theory, not simply the lack of a nonviolent response.

F. *Obscenity and Indecency*

Another possible avenue for defending the restrictions of expression created by Title VII is to assert that they are a permissible attempt to regulate obscenity or indecency. Obscenity, according to the Supreme Court, is not "speech" and therefore lies outside of the protection of the first amendment.²⁸² Vulgarity and indecency, however, are entitled to first amendment protection, although in some contexts this protection is less than full.

Although courts in harassment cases often describe pictures or language in the workplace as "obscene," they appear to be using the term in the lay sense rather than the constitutional sense. Under the test of *Miller v. California*,²⁸³ little, if any, of the speech or pictures at issue are obscene in the first amendment sense.²⁸⁴

The power of government to regulate the use of profane words is limited, even where the regulation is viewpoint neutral. In overturning a conviction for displaying a jacket bearing the statement "Fuck the Draft," the Supreme Court in *Cohen v. California*²⁸⁵ warned against "a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression."²⁸⁶ The Supreme Court further noted that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."²⁸⁷ That, of course, is the rub.

The concern that the government might use the censorship of particular words as a pretext to shut off unpopular views is a serious threat in harassment cases. It is difficult to avoid the conclusion that underlying the Court's opinion in *Cohen* is the suspicion that if Cohen's jacket had said "Fuck the Draftdodgers" he would not have been prosecuted. It is similarly doubtful that

282. *Roth v. United States*, 354 U.S. 476, 485-86 (1957).

283. 413 U.S. 15 (1973). Under *Miller*, in order for a work to be obscene, it must: (1) appeal to a "prurient interest" in sex; that is, it must be erotic; (2) depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) "lack serious literary, artistic, political, or scientific value." *Id.* at 24-25. Vulgar language, even vulgar sexual language, does not ordinarily appeal to a prurient interest in sex.

284. Indeed, in *FCC v. Pacifica Found.*, 438 U.S. 726, 735 (1978), the Supreme Court reviewed an exercise of the FCC's regulatory power with respect to several of the words that figure prominently in sexual harassment cases in which it was conceded by all parties that the words were not "obscene" in the constitutional sense. The Court upheld an FCC ruling against a radio station for broadcasting a George Carlin monologue discussing the words that cannot be said on the radio. The famous "seven dirty words" were: "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *Id.* at 751. Carlin also added three others: "fart," "turd," and "twat." *Id.* at 755. The Court's decision was based on the narrow ground that broadcasting "has received the most limited First Amendment protection" of all media of expression. *Id.* at 748.

285. 403 U.S. 15 (1971).

286. *Id.* at 23.

287. *Id.* at 26. *But see* Wright, *supra* note 235, at 2 ("it will ordinarily be possible to disaggregate the speech into a protected ideational component and an unprotected racist epithet component").

a finding of sexual or racial harassment would be made on the basis of sexually explicit language to argue in favor of sexual equality ("Just because they have cunts doesn't mean they can't do the work") or racially explicit language to argue in favor of racial equality ("You think they are just a bunch of dumb niggers, but they are human beings entitled to just as much respect as you give white people"). On the other hand, a finding of harassment is considerably more likely based upon speech of a similar crude nature expressing the contrary view. Such viewpoint-based regulation cannot be sustained on an "indecent" theory.²⁸⁸

In sum, hostile-environment harassment regulation cannot be supported as an attempt to regulate obscenity or indecency. While it may be that some of the sexually explicit pictures involved in sexual harassment cases constitute obscenity under *Miller*, we do not know because courts have not addressed the issue or even described with any specificity the nature of the material. However, it is quite clear that *Playboy* magazines and "pin-up" calendars are well outside the definition of "obscenity."²⁸⁹ Indeed, it would be difficult even to label such materials "indecent" in today's society, given its ready availability at grocery stores, drug stores, and convenience stores.²⁹⁰

G. Privacy

Another justification for regulation of offensive speech is the protection of employees' privacy interests.²⁹¹ The Court in *Cohen v. California*, though disallowing prosecution for an offensive motto on a jacket, nonetheless acknowledged that states could restrict speech when "substantial privacy interests are being invaded in an essentially intolerable manner."²⁹² However, it is necessary to consider carefully the kinds of speech that might be regulable under such a theory since a broad view of protectable privacy could become the exception that swallows the first amendment.

Whatever the term "invasion of privacy" might mean in this context, it must mean more than disturbances of one's inner tranquility—that is, offense.

288. See *Schacht v. United States*, 398 U.S. 58 (1970) (invalidating federal statute punishing actors wearing United States military uniforms if the portrayal tended to "discredit" that armed force). The Court in *Schacht* held that a law "which leaves Americans free to praise the war in Vietnam but can send persons . . . to prison for opposing it, cannot survive in a country which has the First Amendment." *Id.* at 63.

289. See *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1137-38 (1985), *cert. denied*, 475 U.S. 1094 (1986) (noting that although *Hustler Magazine* is palpably more vulgar than *Playboy*, there was no suggestion that it was obscene).

290. See *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). The *Rabidue* court stated:

For better or worse, modern America features open displays of written and pictorial erotica. Shopping centers, candy stores and prime time television regularly display pictures of naked bodies and erotic real or simulated sex acts. Living in this milieu, the average American should not be *legally* offended by sexually explicit posters.

Rabidue, 584 F. Supp. at 433.

291. See, e.g., Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749 (1985).

292. *Cohen v. California*, 403 U.S. 15, 21 (1971). See also *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2609 (1989) (acknowledging "the sensitivity and significance of the interests presented in clashes between the First Amendment and privacy rights").

Otherwise, much first amendment doctrine becomes superfluous. Fighting words, obscenity, and indecency are regulated in part because they offend, but speech must do more than "merely" offend to be regulable. Derogatory statements about women or minorities, even if profoundly offensive, do not violate privacy. They do not intrude into an inner sanctum where others may be prohibited from treading. Even personal invective, demonstrating that the speaker holds the listener in utter contempt, does not violate a protectable privacy interest.

Unwanted explicit sexual propositions and other personal statements of a sexual nature raise much stronger privacy concerns because they may be viewed as coercing intimacy—even if only a verbal intimacy—about what are unquestionably private matters.²⁹³ A claim to sexual privacy does not depend upon the use of obscene or indecent words though the use of such language strengthens the claim.²⁹⁴ Moreover, the mere presence of sexual magazines in the workplace does not violate an objecting woman's privacy because it does not coerce intimacy. On the other hand, to repeatedly show her graphic pornographic pictures and relate the pictures to her might fairly be viewed as invading a sphere of personal privacy.²⁹⁵

Nonetheless, the absence of reasonably definite standards militates against regulation of such speech. There seems to be no way to limit protection of psychological solitude to the most egregious cases. If a coworker's repeated display of graphic pictures and comparisons to the plaintiff invades her privacy, it is unclear why a coworker's query about whether she looked like a model on a pin-up calendar would not. If the latter allegation suffices, so would, probably, a claim that when the plaintiff asked a man to take down a pin-up, he responded by saying that she was just jealous because she did not look like that. Moreover, if a woman could state a claim by asserting that she felt "violated" by illicit proposals, there seems to be no basis for excluding a claim that she felt violated by the presence of sexual pictures that were merely posted in the workplace without comment.

293. See *Phillips v. Smalley Maintenance Corp.*, 435 So. 2d 705 (Ala. 1983) (holding that an employer's repeated requests that plaintiff engage in oral sex and questions concerning plaintiff's sexual activity with her husband constituted a tortious intrusion into plaintiff's "psychological solitude"); Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO L.J. 899, 922-26 (1979) (equating touching a person's thigh with speech having the same purpose and effect). But see *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970) (finding no invasion of privacy in allegation that defendant caused plaintiff "to be accosted by girls with illicit proposals").

294. Thus, a suggestion that a woman "sit on [a man's] face," see *Wolf v. Jerry Burum, Rent-A-Center of Am., Inc.*, 1990 U.S. Dist. LEXIS 6700 (D. Kan. 1990); *Egger v. Local 276, Plumbers & Pipefitters Union*, 644 F. Supp. 795, 799 (D. Mass. 1986), or the inquiry "How about a little head?," see *Monge v. Superior Court*, 176 Cal. App. 3d 503, 507, 222 Cal. Rptr. 64, 65 (1986), may be just as regulable as the question whether a woman "wanted to fuck," *Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010, 1012 (8th Cir. 1988).

295. See *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) (white supervisor showed the plaintiff, a black woman, a photograph depicting an interracial act of sodomy and told her that the photograph showed the "talent" of a black woman and that she was hired for the purpose indicated in the photograph). Cf. *Coley v. Consolidated Rail Corp.*, 561 F. Supp. 645 (E.D. Mich. 1982) (plaintiff's supervisor kept track of her menstrual cycle on office calendar and made comments about her breasts).

As the Supreme Court recognized in *Hustler Magazine, Inc. v Falwell*,²⁹⁶ the inability to create a workable standard is a sufficient basis for refusing to recognize a cause of action. Rejecting a claim for outrageous conduct by evangelist Jerry Falwell based upon a vulgar parody containing suggestions that he had engaged in sexual relations with his mother in an outhouse, the Court stated:

If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one.²⁹⁷

Recognition of a claim for violating "psychological solitude" would almost inevitably evolve into recognition of a claim for "offense." Yet, in *Falwell*, the Court rejected the "outrageousness" standard precisely because it would "allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience."²⁹⁸

VI. SHOULD FIRST AMENDMENT DOCTRINE BE MODIFIED TO ENCOMPASS SEXUALLY AND RACIALLY OFFENSIVE SPEECH IN THE WORKPLACE?

If, as argued above, the current interpretation of Title VII cannot withstand scrutiny under current first amendment doctrine,²⁹⁹ one obvious response would be to modify the doctrine to permit restriction of sexist and racist speech. A number of recent commentators have suggested that such modifications be adopted.³⁰⁰ However, the case for modification is a weak one that is fundamentally hostile to first amendment values. Moreover, it assumes something that has yet to be demonstrated—that offensive speech totally lacks value under the first amendment.

A. *The Arguments of Proponents of Modification*

Richard Delgado was one of the earliest advocates in the recent movement to strip offensive speech of first amendment protection.³⁰¹ He has urged recognition of a first amendment exception for "[r]acial epithets uttered in face-to-face, one-on-one situations marked with an inequality of power and authority."³⁰² Donald Downs has referred to such speech as "targeted vilification,"³⁰³

296. 485 U.S. 46 (1988).

297. *Id.* at 55.

298. *Id.*

299. See Strauss, *supra* note 1, at 21 ("Sexist speech . . . does not fit within any of the existing categories of expression excluded from First Amendment protection").

300. Strauss, *supra* note 1; Matsuda, *supra* note 256; Wright, *supra* note 235; Delgado, *supra* note 3.

301. Delgado, *supra* note 3.

302. Delgado, *Professor Delgado Replies*, 18 HARV. C.R.-C.L. L. REV. 593, 593 (1983). The elements of the claim are not clear from Delgado's writings. In his initial article, Delgado stated that to prevail in an action for "racial insult," the plaintiff would have to prove that: "Language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult." Delgado, *supra* note 3, at 179. However, in defending the thesis of his original article against criticism that it was insufficiently attentive to first amendment interests, see Heins, *supra* note 273, he recharacterized the elements of the tort of racial insult

a characterization that will be used here. General statements suggesting group inferiority would continue to enjoy first amendment protection. Although there is an intuitively appealing sense in which the two kinds of statements differ, closer scrutiny tends to obliterate the distinction.

"Targeted vilification" is not punishable in Delgado's view simply because it insulted the target. "Targeted vilification" is punishable only when the insult goes beyond the individual and insults a whole group.³⁰⁴ The statement, "Blacks are inferior; you are a black; therefore, you are inferior," is arguably punishable. It is less clear, however, if the simple statement, "blacks are inferior," would be punishable, although it may matter to Delgado whether the statement is made directly to or in the presence of a black. But what possible constitutional distinction can there be between the protected status of the entire syllogism and that of the major premise? After all, the minor premise is simply a matter of fact in a given case, and the conclusion necessarily follows from the two premises whether or not articulated.

Creating a workable definition of the term "targeted vilification" is not so easy. Many statements that could be viewed as insulting or demeaning would not constitute vilification in the sense of "abus[ing] as hateful or vile."³⁰⁵ Moreover, many ethnic jokes, although relying on stereotypes, are not necessarily venomous. However, courts in harassment cases have generally proceeded no further than identifying the presence of "ethnic jokes" to condemn the workplace as hostile without inquiring into the nature of the particular joke.³⁰⁶ Delgado's definition of "vilification" is far broader than scurrilous racial epithets, including any speech that "demean[s] through reference to race."³⁰⁷ It is unclear, for example, whether a restaurant owner engaged in targeted religious vilification when he told a waitress that she thought she was special, "just like all the other f—ing Jewish broads around here."³⁰⁸ The New York Court of Appeals upheld a damages award in her favor on the ground that the owner had discriminated against the waitress by "revil[ing] her religion in a matter related to her working conditions."³⁰⁹ Yet, stripped of the crudeness of the message, the owner was simply saying that all of his Jewish female employees thought they were spe-

to the standard of one-on-one abuse described in the text. There may be a large difference between language "intended to demean through reference to race" and "racial epithets," the former including much speech that is far more subtle than the latter. Moreover, Delgado's initial formulation did not require an inequality of power. It is not clear whether Delgado has changed the definition of the tort or whether his "retreat" was merely tactical.

303. Downs, *supra* note 273, at 661.

304. Cf. Matsuda, *supra* note 256, at 2357-58 (advocating criminalizing racist speech having the following characteristics: (1) a message of "racial inferiority"; (2) directed against a "historically oppressed group"; and (3) the message is "persecutorial, hateful, and degrading." Thus, the first amendment has some continuing vitality since "[h]ateful verbal attacks upon dominant-group members by victims is permissible"). See also Downs, *supra* note 273, at 646 (arguing for regulation of "targeted racial and ethnic vilification").

305. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2552 (3d ed. 1986).

306. See, e.g., *Woods v. Graphic Communications*, 925 F.2d 1195, 1201-02 (9th Cir. 1991) ("racial jokes"); *Snodgrass v. Brown*, 1990 U.S. Dist. LEXIS 16418 at *26 (D. Kan. 1990) ("sexual jokes").

307. *Professor Delgado Replies*, *supra* note 302, at 593.

308. *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 436 N.Y.S.2d 231, 233, 417 N.E.2d 525, 527 (1980).

309. *Id.*

cial.³¹⁰ That may be an unfair or untrue stereotype, but it is difficult to see how the statement reviles the Jewish religion. Had the New York Court of Appeals applied the "targeted vilification" standard proposed by Delgado, however, there appears little doubt about the outcome. Similarly, how does one deal with a reference to someone as "the ugly black guy" or "the dumb-looking white guy." Those statements arguably "demean through reference to race," although they do not demean the race. At bottom, those advocating reduced protection for racist and sexist speech are simply trying what so many people who have gone before them have tried—to reserve the power to censor speech they do not like. As is so often the case, it is difficult to be optimistic that any exception so created could be contained.³¹¹

The argument for a first amendment exception for racist speech suffers from a substantial internal inconsistency. Delgado suggests that the words are "harmful in themselves"³¹² and that "they constitute 'badges and incidents of slavery' and contribute to a stratified society in which political power is possessed by some and denied to others."³¹³ He also asserts that such words "injure the dignity and self-regard of the person to whom they are addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood."³¹⁴ Not only do the words convey that message, according to Delgado, they convey it effectively, because minorities "will find it difficult not to accept those judgments."³¹⁵ After describing in detail how racial insults cause harm by communicating a social message with which he disagrees, Delgado then argues that racial insults are not protected by the policies of the first amendment since they do not "advance political dialogue, further the search for truth, or help society strike a balance between stability and orderly change."³¹⁶ The latter assertion—that the words may be banned because they convey no message—is difficult to square with his earlier assertion that the words cause harm *because* of their message.³¹⁷

If, as Delgado argues, a racial insult may be prohibited because of its implicit message that "distinctions of race are distinctions of merit, dignity, status,

310. Moreover, at least in terms of the words that were used, it is arguably more insulting to women than to Jews.

311. For example, in a comment criticizing the court's decision in *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989), which struck down the University's offensive-speech policy, a student commentator, describing the problem of racist and sexist speech on campus, equates the statement "Die Chink. Hostile Americans want your yellow hide" with references to women students as "fat housewives." Comment, *First Amendment Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech—Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989), 103 HARV. L. REV. 1397, 1400 (1990). Both are subsumed under the category of "hate speech." Cf. *id.* at 1400. Many people would not think that the two statements are equivalent in any moral sense; the commentator does. The wisdom of a first amendment doctrine that leaves it to a judge or jury to make such decisions on a case-by-case basis is far from apparent.

312. Delgado, *supra* note 3, at 173.

313. *Id.* at 178 (footnotes omitted) (quoting the Civil Rights Cases, 109 U.S. 3 (1883)).

314. *Id.* at 135-36.

315. *Id.* at 146 (footnote omitted) (quoting K. KENNISTON, ALL OUR CHILDREN 33 (1977). See also Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 462-63 (1987).

316. Professor Delgado Replies, *supra* note 302, at 594.

317. See *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) ("if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection").

and personhood,"³¹⁸ it is unclear why the explicit statement that distinctions of race are distinctions of merit, dignity, status, and personhood" may not be similarly prohibited. Calling a black person "nigger" probably conveys a more offensive message than a statement that blacks are not entitled to equal status in our society, but that is largely because the word conveys a passionate and complex message rife with social and historical meaning.³¹⁹ It is offensive precisely because of its capacity to convey meaning.

One highly unsatisfactory response to first amendment objections is simply to label racist speech *sui generis* and declare that the normal rules do not apply. Mari Matsuda makes such an argument by asserting that racist speech presents "an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse."³²⁰ The flaws in her argument are manifest. First, there is substantial irony in labelling an idea both "historically untenable" and "dangerous" at the same time. Its danger suggests that it has not been found quite so untenable historically. Second, it is far from clear that without the coercive power of the state victims of racist speech are unable to respond. James Watt, Earl Butz, Al Campanis, Jimmy Breslin, and Andy Rooney may well have a different view. Third, racist speech has no greater claim—indeed a lesser claim—to *sui generis* status than some other forms of speech that are unregulable, such as speech advocating the violent overthrow of the government.³²¹

Fourth, the difficulty in determining whether particular speech subjects the speaker to sanctions would cause a major chilling effect on all speech dealing with racial matters.³²² For example, Matsuda would allow an assertion that particular groups are genetically superior only if it was made "in a context free of

318. Delgado, *supra* note 3, at 135-36.

319. See Greenawalt, *Insults and Epithets: Are They Protected Speech*, 42 *RUTGERS L. REV.* 287, 304 (1990) (when laws regulate group epithets and slurs, "what is being suppressed really is a message whose content and intensity is judged hurtful and obnoxious. This language cannot be characterized as 'low value' speech, except by virtue of a judgment about its substantive message").

320. Matsuda, *supra* note 256, at 2359. See also Kretzmer, *supra* note 315, at 458 ("racism is unique").

321. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 31 (1971) where Bork states:

Speech advocating forcible overthrow of the government . . . violates constitutional truths about processes and . . . is not aimed at a new definition of political truth by a legislative majority. Violent overthrow of government breaks the premises of our system concerning the ways in which truth is defined, and yet those premises are the only reasons for protecting political speech.

Unlike speech advocating forcible overthrow of the government, racist speech does not violate the premises of our system. Though such speech may clash with egalitarian ideals, it does not challenge the notion of majority rule. The most that can be said of racist speech is that it deserves no more protection than speech advocating a nonviolent transition to a nondemocratic form of government or speech advocating any other nondemocratic idea.

322. Justice Douglas' dissent in *Beauharnais v. Illinois*, 343 U.S. 250, 286 (1952), was prophetic:

Today a white man stands convicted for protesting in unseemly language against our decisions invalidating restrictive covenants. Tomorrow a Negro will be haled before a court for denouncing lynch law in heated terms. Farm laborers in the West who compete with field hands drifting up from Mexico; whites who feel the pressure of orientals; a minority which finds employment going to members of the dominant religious group—all of these are caught in the mesh of today's decision. . . . The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty. They chose liberty.

hatefulness and without the endorsement of persecution.”³²³ Thus, before speaking, a potential speaker must consider whether he can prove in court that the context is “free of hatefulnes” and that he is not endorsing “persecution.” This is not necessarily an easy determination. For example, some would no doubt argue that statements urging the elimination of affirmative action are hateful and advocate persecution, yet such statements seem to be the kind of political speech that is at the core of first amendment protection.

Exempting targeted vilification in the context of an imbalance in power from the strictures of the first amendment might satisfy Delgado’s desire for a racist-speech tort, but it would leave a great deal of speech that has heretofore been regulated under Title VII unregulated. Many courts have permitted harassment actions to proceed based in part upon offensive speech that was not directed toward the plaintiff³²⁴—that is, not “targeted”—and some courts have permitted harassment actions based in part upon speech that was not even witnessed by the plaintiff.³²⁵ Other courts have permitted harassment actions by coworkers where no such imbalance in power is present,³²⁶ and some courts have even permitted harassment actions by supervisors challenging the speech of their subordinates.³²⁷ Unless “inequality of power” means something other than the relationship between the individual speaker and the individual listener, Delgado’s exception would not apply.

The fact that the preceding discussion has focused on the more extreme and vicious epithets that may be hurled at blacks and women should not obscure the fact that harassment doctrine under Title VII is not so limited. Even if the word “nigger” may be prohibited consistent with the first amendment, what about other words applied to blacks, such as “nigra,” “Negro,” “colored,” and, with the advent of the now-preferred “African American,” perhaps even the term “black” itself? All of the above words were at one time thought to be the “civil” alternative to more demeaning references. They may now be considered to be insulting to varying degrees.³²⁸ Moreover, not all offensive speech consists of discrete epithets; it may also include ideas that are viewed as offen-

323. Matsuda, *supra* note 256, at 2358. This standard is reminiscent of the group libel statute considered in *Beauharnais v. Illinois*, 343 U.S. 250, 254 (1952), where truth was a defense only when “published with good motives and for justifiable ends.”

324. See *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 n.2 (11th Cir. 1982) (even though racial slurs not directed at plaintiff, language nonetheless had effect of altering conditions of employment); *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 794, at 31 (M.D. Fla. 1991) (“The perception that the work environment is hostile can be influenced by treatment of other persons of a plaintiff’s protected class, even if that treatment is learned second-hand”); *Delgado v. Lehman*, 665 F. Supp. 460, 468 (E.D. Va. 1987) (“the record is replete with [the supervisor’s] . . . attitude toward and remarks about other women”).

325. See *Broderick v. Ruder*, 685 F. Supp. 1269, 1275 (D.D.C. 1988) (“evidence of the general work atmosphere, involving employees other than the plaintiff, is relevant to the issue of whether there existed an atmosphere of hostile work environment which violated Title VII”).

326. *Henson v. Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (“The capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual”).

327. *Moffett v. Gene B. Glick Co., Inc.*, 621 F. Supp. 244, 272 (N.D. Ind. 1985) (allowing action by supervisor based upon harassment of subordinates on ground that “the relationship between the parties is immaterial to the question of whether plaintiff could be harassed in violation of Title VII”); *Erebia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986).

328. See *Delgado*, *supra* note 3, at 179-80 (“boy” might be actionable, but “dumb honkey” might not be).

sive but expressed without use of offensive words.³²⁹ Many harassment claims have been based upon racial, ethnic, or sexual jokes. Although some may find such jokes categorically offensive, most would acknowledge a broad range of meaning for such jokes. Although some are hateful, others are more gentle, even affectionate.³³⁰ Courts in harassment cases, however, almost never describe the jokes for which they are imposing liability, instead simply describing them as "racial and ethnic jokes" or "dirty jokes" and assuming that is the end of the inquiry.

Similarly, in the sexual context, assuming that the most offensive vulgarities are regulable, other terms, such as "broad,"³³¹ "girls," or even "ladies," or such terms of address as "honey," "babe,"³³² and "tiger"³³³ are less obviously so, even though they are often considered "degrading" of the female sex.³³⁴ Moreover, if sexual terms limited to women are prohibited, that suggests that equivalent terms relating to men should likewise be prohibited.³³⁵ A rule that prohibited anti-female statements but permitted anti-male statements would be inconsistent with the viewpoint neutrality required by the first amendment.

A mighty conviction that "women should not be sex objects" or that "bigotry is bad" is an insufficient basis for attempting to outlaw expressions of those views. In the first place, the first amendment requires an official agnosticism on questions of social policy.³³⁶ Government may legitimately advocate and imple-

One court has even held that the term "Mexican" is derogatory when applied to Mexicans. *Dominguez v. Stone*, 97 N.M. 211, 213, 638 P.2d 423, 425 (N.M. App. 1981).

329. See, e.g., *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 384 (D. Minn. 1980) ("Send all blacks back to Africa").

330. Consider for example, the joke, "How many Jewish mothers does it take to screw in a light bulb? None—I'll just sit here in the dark." Even though some people may be offended by the joke, it is difficult to consider it hateful. Of course, part of the reason that it is not considered hateful is that it builds on a stereotype that Jews themselves endorse; many a borscht-belt comedian has made a career out of similar jokes.

331. *Sanchez v. Miami Beach*, 720 F. Supp. 974, 977 (S.D. Fla. 1989).

332. See *Delgado v. Lehman*, 665 F. Supp. 460, 463 (E.D. Va. 1987).

333. *Volk v. Coler*, 845 F.2d 1422, 1426-27 (7th Cir. 1988).

334. See *Love*, *supra* note 3, at 139 n.140:

The word "female" was preferred over "women" in the nineteenth century, but soon "female" was considered degrading, and it was replaced by "lady," which in turn became vulgarized. As a society, we have now come full circle, and "woman," newly rehabilitated, is the term of choice for referring to a person of the female sex.

But see Delgado v. Lehman, 665 F. Supp. 460, 468 (E.D. Va. 1987) (supervisor "used the term 'woman' in a derogatory manner").

335. Greenawalt argues that "[c]alling a woman a cunt should be treated like calling a man a 'prick.'" Greenawalt, *supra*, note 319, at 299. The two epithets may not be equivalents in meaning, however, even if they enjoy equivalent status under the first amendment. Calling a man a "prick" is equivalent to calling him a "bastard," an "asshole," or a "son of a bitch." He is being attacked as an individual on the basis of an obnoxious personality. The term "cunt," on the other hand, is perceived, at least by some, as having a broader meaning that is derisive toward the entire sex. Thus, "bitch" is probably more equivalent to "prick," having at least in some contexts more of an individualized meaning. The statement "She's a bitch" is not usually intended to reflect on women as a whole, although the use of the term generically—such as "The bitches are out to lunch"—probably does. However, that is a distinction that not everyone would necessarily make. See Strauss, *supra* note 1, at 1 ("Women are called 'cunt,' 'pussy,' and 'bitch'"). In any event, a restriction on expression that rests on such fine distinctions cannot help but overregulate expression.

336. *But see Williams v. Wallace*, 240 F. Supp. 100, 106 (M.D. Ala. 1965): "[I]t seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against."

ment one policy over another, but it may not stifle debate simply by labelling certain social views "wrong." Mari Matsuda, however, would do just that. She argues: "We can attack racist speech— not because it isn't really speech, not because it falls within a hoped-for neutral exception, but because it is wrong."³³⁷ How do we know it is wrong? She tells us that racist speech is wrong because everybody knows it is wrong: "The uniform rejection of racist ideology is evidence of moral truth."³³⁸ Of course, not everyone rejects racist ideology; if everyone did there would be nothing to discuss.³³⁹ But if we assume that her point is rather that where a vast majority has rejected the ideology, we may label the beliefs of the holdouts "wrong," she is advocating a rule that the speech of minorities is not entitled to protection where it conflicts with the views of a substantial majority. Such reasoning turns the first amendment on its head, since if majority sentiments may be called upon to justify suppression of minority viewpoints, the first amendment fails in its essential purpose: The views of a majority need no constitutional protection from political processes, and, according to Matsuda, the views of the minority are not entitled to protection when they run counter to the majority. To paraphrase Justice Powell in *Gertz v. Robert Welch, Inc.*,³⁴⁰ there is *almost* no such thing as a false idea.

Judge Keith, dissenting in *Rabidue*, had similar confidence in his ability to divine the morally correct position. The majority had invoked contemporary mores for its conclusion that the effect of pin-up posters should not be deemed hostile "in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the news-

337. Matsuda, *supra* note 256, at 2380. See also Wright, *supra* note 235, at 2 (theory of article "seeks also to give appropriate theoretical weight to the society's recognition of the sheer moral wrongness of racist speech, as distinguished from the possible harmful social and psychological consequences of such speech in particular cases"); *id.* at 9 ("[t]he essence of the public policy underlying the wrongness of the use of racial epithets is . . . that it is morally wrong, largely independent of its degree of popularity or offensiveness").

Suggestions of this kind demonstrate the danger in relying upon a "search for truth" justification for free expression. See Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 617 (1982):

[A]ny theory positing that the value of free speech is the search for truth creates a great danger that someone will decide that he finally has attained knowledge of the truth. At that point, that individual (or society) may feel fully justified, as a matter of both morality and logic, in shutting off expression of any views that are contrary to this "truth."

338. Matsuda, *supra* note 256 at 2359 n.203 (E. Rapaport ed. 1978). But see J.S. MILL, ON LIBERTY 16 (London 1859) ("If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind").

339. Matsuda acknowledges that perhaps not every country has rejected a racist ideology, but she suggests that if South Africa has not done so, it does not disprove her assertion of "uniform rejection," but rather shows that South Africa is morally wrong. Matsuda, *supra* note 256, at 2359. She points out that in making its case to the world community, South Africa is careful to avoid an "explicit ideology of racial supremacy." But to show that expression of a given ideology is impolitic at a given time is hardly dispositive of whether it is a moral absolute. Moreover, the same argument could be made about other ideologies as well, such as democracy. Even the most repressive countries—perhaps especially those countries—have taken pains to label themselves democracies: the Democratic Republic of Kampuchea, the German Democratic Republic, the People's Republic of China. Few countries advocate an ideology of dictatorship. By Matsuda's reasoning, banning advocacy of nondemocratic forms of rule would thus be consistent with the first amendment because a dictatorship of a few oppressing the many is "morally wrong." Needless to say, we already know that not only is advocacy of a dictatorship constitutionally protected, advocacy of armed overthrow of our democratic government in order to establish that dictatorship is likewise protected. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

340. 418 U.S. 323, 339 (1974).

stands, on prime-time television, at the cinema, and in other public places.”³⁴¹ Judge Keith rejected that line of argument, suggesting that “‘society’ in this scenario must primarily refer to the unenlightened,” and then went on to assert that “the relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery.”³⁴² Judge Keith then expressed doubt that “reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture.”³⁴³ He thus dismissed societal norms—in addition to the values of “unreasonable” women—as a basis for evaluating the offensiveness of speech, preferring instead to measure the speech against the views of the “enlightened.” Needless to say, it would be the rare judge for whom the views of the enlightened were in conflict with his own.

An impulse to censor should not follow from the certainty of one’s moral views. Those who are willing to restrict speech based upon their views of “moral truth” or “enlightened vision” should consider the following observation by John Stuart Mill:

Unfortunately for the good sense of mankind, the fact of their fallibility is far from carrying the weight in their practical judgment which is always allowed to it in theory; for while everyone well knows himself to be fallible, few think it necessary to take any precautions against their own fallibility, or admit the supposition that any opinion of which they feel very certain may be one of the examples of the error to which they acknowledge themselves to be liable.³⁴⁴

Certainty about the correctness of one’s views should not lead to certainty about the correctness of silencing one’s opponents.

It has been argued that categorical protection of speech is necessary to protect free expression in “pathological times.”³⁴⁵ That protection should not be viewed, however, as protection that we are preserving for a hypothetical “rainy day.” A greater or lesser degree of pathology is always with us; only its form changes. We feared communists in the 1950s, hippies in the 1960s, and Nazi marchers in Skokie in the 1970s. Today’s bogey men are the racists and the sexists. Of one thing we may be certain: any precedents established “just this once” to permit regulation of racist and sexist speech will later be called upon to support regulation of other speech.

Any kind of balancing approach presents the opportunity for the decision-maker to judge the challenged speech against his own values and is therefore unlikely to be sufficiently protective of speech. The risk that a balancing approach will “balance away” the right to free speech is demonstrated by the arguments of Marcy Strauss.³⁴⁶ She identifies four categories of sexist speech that might be the subject of sexual harassment complaints; then, employing a balancing approach, concludes that almost all such speech is subject to prohibition. The four categories are: “(1) sexual demands or requests; (2) sexually

341. *Rabidue v Osceola Refining Co.*, 805 F.2d at 622.

342. *Id.* at 627 (Keith, J., dissenting).

343. *Id.*

344. J.S. MILL, *supra* note 338, at 17.

345. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 474-80 (1985).

346. See Strauss, *supra* note 1.

explicit speech directed at the woman employee; (3) degrading speech directed at the employee; and (4) sexually explicit or degrading speech or expression that is not directed at the woman, but which she overhears or sees".³⁴⁷ According to Strauss, a balancing of the state's interest in prohibiting the first three categories always outweighs the free speech interest. Sexual demands or requests may be regulated because of "the state[s] interest in preventing employers from coercing employees into sexual relationships."³⁴⁸ The state's interest in regulating sexually explicit speech directed at an employee is outweighed by "the state's interest in equality" and "the state's interest in protecting a captive audience."³⁴⁹ Directed speech that is degrading is "discriminatory" and therefore subject to regulation.³⁵⁰ Only degrading speech not directed at the employee is subject to an ad hoc balancing test. However, once the plaintiff shows that "she was unable to escape exposure to the speech," the speech should be considered directed, therefore falling into the third category of automatically regulable speech.³⁵¹ As a result, "the area of nondirected speech is limited."³⁵² Surprisingly, however, Strauss suggests that her approach "reaffirms . . . a commitment to preserving the values of freedom of expression."³⁵³

The risk of balancing is also demonstrated by the analysis of the court in *Robinson v. Jacksonville Shipyards, Inc.*,³⁵⁴ in which the court engaged in a balancing of "the governmental interest in cleansing the workplace of impediments to the equality of women" against the offensive speech. Not surprisingly, the court favored the former interest. The way it formulated the comparison, no rational person could come to the opposite conclusion. After all, what is more important—the equality of women or a few dozen dirty pictures? Seldom will the speech suppressed by a given application of a law outweigh the abstract goals supporting the law, but in assessing a first amendment challenge to a national-security law that suppresses dissent, we do not balance national security against the value of the unpatriotic ramblings of the mentally ill war protester who happens to have been ensnared by the law. A proper comparison in *Robinson* would be between the goal—the equality of women—and the total amount of expression that is suppressed by Title VII. Even then, the means would have to be narrowly tailored to achieve the end, and there would have to be a strong nexus between the means and the ends. Although the *Robinson* court asserted that the means were narrowly tailored,³⁵⁵ the court nowhere explained how a standard that makes speech unlawful if "a reasonable woman would perceive that an abusive working environment has been created,"³⁵⁶ could possibly be

347. *Id.* at 43.

348. *Id.* at 44.

349. *Id.* at 45.

350. *Id.* at 46.

351. *Id.* at 48.

352. *Id.*

353. *Id.* at 51.

354. 1991 U.S. Dist. LEXIS 794, at *158-59 (M.D. Fla. 1991).

355. *Id.* at 159.

356. *Id.* at 118.

considered narrowly tailored. What the court's analysis really demonstrates is that it did not take the first amendment issue seriously.

B. *The Value of Offensive Speech*

The considerations discussed above counsel hesitation even if we are convinced that offensive speech lacks first amendment value. The problem of the "slippery slope" suggests that regulating speech that we assume valueless may lead to regulation of speech that does have value.³⁵⁷ Moreover, there is a substantial difficulty in establishing an acceptable mechanism for determining on an ad hoc basis which speech is protected and which is not. These concerns assume even greater proportions, however, if it is acknowledged that some of these statements are not wholly without first amendment value.

Scholars over the years have identified a number of reasons that we protect speech.³⁵⁸ A detailed discussion of these reasons is beyond the scope of this Article, but under almost any rationale, at least some of the speech involved in harassment cases has some value. The most obvious traditional first amendment value of racist and sexist speech is that it constitutes an expression of views on important issues of social policy. Political speech is often said to be at the "core" of first amendment protection.³⁵⁹ It cannot be doubted that the general subject of relations between the sexes and the races is an important matter of public concern. Everyone would agree that statements such as "blacks are entitled to the same respect as whites" or "women have as much right to participate in the economic life of our country as men" have significant value under the first amendment; indeed those sentiments have been enshrined in many of our laws. For purposes of political debate, the converse of those statements must also be seen as having first amendment value because of the government's "paramount obligation of neutrality."³⁶⁰ Although we may personally believe that the former statements have greater merit, in the sense that they are morally correct and reflect contemporary values, under the first amendment both statements are entitled to equal legal protection.³⁶¹ That we as a society no longer accept the truth of the statements arguing for inequality does not make them any less worthy of protection.³⁶² Under almost everyone's view of the first

357. See Heins, *supra* note 273, at 592 n.39 ("Tolerating ugly, vicious speech is a small but necessary price to pay for the freedom to advocate social change and justice").

358. Compare T. EMERSON, *THE SYSTEM OF FREE EXPRESSION* 6-7 (1970) (asserting that the first amendment serves four values: (1) "assuring individual self-fulfillment"; (2) "advancing knowledge and discovering truth"; (3) "provid[ing] for participation in decision making by all members of society"; and (4) "achieving a more adaptable and hence a more stable community, . . . maintaining the precarious balance between healthy cleavage and necessary consensus") with Bork, *supra* note 321, at 26 (the first amendment protects only "explicitly and predominantly political speech").

359. See generally A. MEIKELJOHN, *POLITICAL FREEDOM* (1948).

360. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976).

361. See A. MEIKELJOHN, *supra* note 359, at 26-28 (1948). ("The vital point . . . is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. . . . These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant.") See also J.S. MILL, *supra* note 338 at 17. ("To refuse a hearing to an opinion because they are sure that it is false is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility.")

362. But see L. BOLLINGER, *THE TOLERANT SOCIETY* 54 (1986):

amendment, the statements would have been protected in the nineteenth century, when they reflected prevailing social norms; they cannot be banned now simply because conceptions of sound policy have changed.³⁶³

In addition to whatever value it might have in contributing to political discourse, sexist and racist speech also may serve a valuable function by acting as a "safety valve," which has been recognized by some as a reason to protect speech.³⁶⁴ A similar value has been identified in ethnic jokes.³⁶⁵ One of the commonly cited functions of the first amendment is to encourage expression of feelings of frustration and thereby decrease resort to violence.³⁶⁶ In a number of harassment cases, it appears that some of the offensive language is a product of resentment of affirmative action or even of prohibitions against discrimination. If so, that resentment can only be exacerbated by insulating women and minorities from offense and requiring a modification of employee behavior upon entry of women or minorities into the workplace. Expressions of hostility may be superior to the manifestations of hostility that might result if the expression is prohibited.

Modification of first amendment doctrine should not even be contemplated to accommodate harassment claims without a clear vision of the benefits of doing so. Yet, it is far from obvious that regulation of offensive speech achieves

The more we believe in the immorality or error of the ideas being expressed through the speech, the more attenuated is the truth-seeking advantage claimed as the justification for the free speech principle. The "value" to us in these terms ranges from remote to none. Just as in [the] libel area the Court sometimes recognized no "value" in defamatory false statements of *fact*, so we might appropriately extend that to at least some portion of the realm of opinion as well.

363. See *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) ("a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence").

364. *Id.* at 375. Justice Brandeis continued:

But [the founders] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

See also W. PROSSER & P. KEETON, ON TORTS, 59 (5th ed. 1984):

There is still, in this country at least, such a thing as liberty to express an unflattering opinion of another, however wounding it may be to the other's feelings; and in the interest not only of freedom of speech but also of avoidance of other more dangerous conduct, it is still very desirable that some safety valve be left through which irascible tempers may blow off relatively harmless steam.

But see *Wright*, *supra* note 235, at 3 (suggesting that use of racial epithets to "vent frustration" does not "implicate significantly the purposes or values underlying the free speech clause").

365. See *Snell v. Suffolk County*, 611 F. Supp. 521, 529-30 (E.D.N.Y. 1985) (for majority group members, ethnic humor may displace aggression, protect self-esteem, define self-image, and reduce uncertainty about the perceived world, and for minority group members, it may "strengthen their morale and bolster their sense of identity") (collecting sources).

366. Redish has commented on such a function, suggesting that the theoretical fallacy of the *Chaplinsky* doctrine "is the assumption that the value of free speech is as a means to attain truth":

Why not view *Chaplinsky's* comments as a personal catharsis, as a means to vent his frustration at a system he deemed—whether rightly or wrongly—to be oppressive? Is it not a mark of individuality to be able to cry out at a society viewed as crushing the individual? Under this analysis, so-called "fighting words" represent a significant means of self-realization, whether or not they can be considered a means of attaining some elusive "truth."

Redish, *supra* note 337, at 626. See also Greenawalt, *supra* note 319, at 289 ("Despite causing occasional divisiveness, [freedom of expression] can enhance social stability by reducing resentment"); *Snell*, 611 F. Supp. at 531 (suggesting that ethnic slurs may have "cathartic value").

the goals of eliminating prejudice. In fact, expressions of sexist and racist views may actually have a *beneficial* impact on social views, because hearing such statements in their baldest form may have the effect of demonstrating the poverty of the beliefs expressed. As John Stuart Mill recognized, even obviously false statements are worthy of protection:

[E]ven if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds.³⁶⁷

The creators of *All in the Family* understood this. Archie Bunker was not created as a television character for the purpose of persuading viewers of the correctness of his ideas.³⁶⁸ Rather, his character was an attempt to demonstrate the ugliness of prejudice by exposing viewers to its expression. Stifling that expression could have the unwanted effect of reducing the extent to which persons having unarticulated prejudices examine them.³⁶⁹

It is also doubtful that regulation of offensive speech advances the goal of facilitating the acceptance of women and minorities in the workplace; indeed, one can imagine the frustration that accused harassers must sometimes feel. For example, in *Lynch v. Des Moines*,³⁷⁰ the court agreed that when it came to "raw sexual banter," the plaintiff "sometimes gave as much as she got." Nonetheless, the court sustained her claim on the ground that she had indicated to the alleged harassers and her supervisor that "this state of affairs was offensive and unacceptable."³⁷¹ Likewise in *Loftin-Boggs v. Meridian*,³⁷² the court, although denying plaintiff's claim because she had participated in and even initiated some of the crude language, jokes, and sexual storytelling that were already prevalent in the department, suggested that she legitimately could continue to exercise veto power over the speech of her coworkers.

Plaintiff's participation in the conduct leading to the creation of the alleged hostile environment does not permanently bar a successful claim of sexual harassment. Once her participation is established, however, she must be able to identify with some precision a point at which she made known to her co-workers or superiors that such conduct would [henceforth] be considered offensive.³⁷³

In other words, though a willing participant in the sexual banter, the plaintiff has a continuing power to silence her coworkers.

367. J.S. MILL, *supra* note 338, at 50.

368. See *Howard v. National Cash Register Co.*, 388 F. Supp. 603, 606 (S.D. Ohio 1975) (referring to Archie Bunker as "a character who is prejudiced and biased against all persons other than of his own neighborhood, religion and nationality").

369. Vincent Blasi has suggested another reason to tolerate extremist speech: "[T]here is real value in letting persons who hold extremist views participate in the processes and rituals of governance. It is a significant gesture, symbolizing a reliance on consent rather than force, for a political community to treat its most hated and irresponsible members as citizens nonetheless."

Blasi, *The Teaching Function of the First Amendment* (Book Review), 87 COLUM. L. REV. 387, 408 (1987).

370. 454 N.W.2d 827 (Iowa 1990).

371. *Id.* at 834.

372. 633 F. Supp. 1323 (S.D. Miss. 1986).

373. *Id.* at 1327 n.8.

Similar reasoning was employed in *Swentek v. USAir, Inc.*,³⁷⁴ in which the court of appeals overturned a defense judgment that had been granted in part because of the plaintiff's own past conduct and use of foul language. The district court had ruled against the stewardess plaintiff based upon findings that she had placed a "dildo" in her supervisor's mailbox to get her to "loosen up," urinated in a cup and passed it as a drink to another employee, and had grabbed the genitals of a pilot with a "frank invitation to a sexual encounter." The court of appeals held that "[p]laintiff's use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.'"³⁷⁵ The court instructed the district court on remand to determine "whether plaintiff welcomed the particular conduct in question from the alleged harasser."³⁷⁶

The "continuing veto" approach has been adopted by analogy to rules established in rape cases and expanded to quid pro quo harassment, but it is inappropriate for courts to import those principles on a wholesale basis into the law of environmental harassment. There is substantial difference between a rule that a woman may withhold consent at will to each act of intercourse and a rule that a woman may withhold consent at will to each utterance of foul language by others.³⁷⁷ The courts in *Lynch*, *Loftin-Boggs*, and *Swentek* seem to permit employees in a protected class to engage in the same conduct that they later complain of and then to "touch base" and declare that they prefer to participate no longer. That seems less an antidiscrimination principle than a principle of special treatment, which is more likely to lead to resentment than acceptance of women and minorities in the workplace.

If the goal of those who advocate eliminating first amendment protection for offensive speech is to decrease the amount of offense suffered by the groups intended to be protected, their means may be counter-productive. There is substantial question whether it is sound public policy to permit a person to recover for offense, since the moral hazard is great. Creation of a cause of action for offense may simply result in an increase in offense, because the potential for recovery in a civil action creates a substantial incentive to interpret language as offensive.³⁷⁸ It may well be that, as Magruder argued over a half-century ago, a "toughening of the mental hide is a better protection than the law could ever

374. 830 F.2d 552 (4th Cir. 1987).

375. *Id.* at 557 (quoting *Katz v. Dole*, 709 F.2d 251, 254 n.3 (4th Cir. 1983)). In *Katz*, there was no evidence that "linguistic intimacy" was known to harassing employee.

376. *Swentek*, 830 F.2d at 557.

377. The court in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), also adopted a view that allows a plaintiff substantial unilateral control over whether a defendant's conduct is actionable. There, the court held that even though the district court had understandably characterized the accused harasser's conduct as "isolated and trivial," *id.* at 880, the plaintiff had established a prima facie case of harassment because she did not consider the conduct to be trivial and the court could not say that, as a matter of law, the plaintiff's reaction was "idiosyncratic and hypersensitive." Thus, under the Ninth Circuit's view, the plaintiff need not establish that the defendant's conduct was unreasonable; she need show only that her reaction to it was not unreasonable as a matter of law.

378. In one sexual harassment case about which the author has personal knowledge, the plaintiff contended that her supervisor had told her that she should turn her house into a brothel. On deposition it turned out that the basis for her contention was that her supervisor, who sold real estate in his spare time, had told her, "You should make your house work for you."

be."³⁷⁹ Kent Greenawalt acknowledges that general principle, but argues that in the context of racist speech it is inapplicable: even if "coarse and . . . hurtful comments should be protected in the rough and tumble of vigorous dialogue . . . group epithets and slurs designed to wound listeners are another matter."³⁸⁰ However, it is not clear why group epithets and slurs are "another matter" other than the fact that we may choose to believe that they are. Under Greenawalt's view, the most hurtful epithet that might be hurled at a particular white person is protected by the first amendment; *any* hurtful epithet relating to race that one might direct to "a reviled minority" is not.³⁸¹ Although the Supreme Court has in several cases held that expression directed toward children is entitled to less constitutional protection than that directed toward adults,³⁸² it is probably not in the interests of minorities (and women) to be the beneficiaries of that kind of protectionist doctrine. In any event, in an age when racist and sexist sentiments are deemed in most circles to reflect adversely on the speaker rather than the target, modification of constitutional doctrine to permit legal sanctions against racist and sexist expression seems largely unnecessary.

VII. THE FUTURE OF HOSTILE-ENVIRONMENT THEORY

A conclusion that the current definition of hostile-environment harassment is unconstitutional does not sound the death knell for the hostile-environment theory. The truly egregious cases, such as *Hall v. Gus Construction Co.*,³⁸³ will remain unaffected, because they typically rely little on protected expression. Moreover, the analysis presented here does not impair the strength of hostile-environment cases based upon unwanted sexual touching. Only the ability of a plaintiff to make out a hostile-environment case based upon expression is substantially affected.

Given that most of the expression involved in harassment cases cannot be punished under the first amendment, admission into evidence of expression to support a hostile-environment claim should be the exception, rather than the rule. A hostile-environment claim cannot be based even in part on protected expression.³⁸⁴ Therefore, the woman who complains that her supervisor touched her in inappropriate ways and posted *Playboy* pin-ups on his wall should not be permitted to introduce the latter evidence; instead, her case must stand or fall on whether the touching was unwanted and sufficiently severe and pervasive to create a hostile environment.³⁸⁵

379. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936). See also *Bradshaw v. Swagerty*, 1 Kan. App. 2d 213, 216, 563 P.2d 511, 514 (1977) (racial epithets are "insults of the kind which must be tolerated in our roughedged society").

380. Greenawalt, *supra* note 319, at 307.

381. Under this view, calling a white man the "illegitimate son of a diseased whore" is protected by the first amendment; calling a black man "boy" is not.

382. *New York v. Ferber*, 458 U.S. 747 (1982); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

383. See *supra* note 57.

384. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920-24 (1982).

385. The fact that viewpoint-neutral prohibitions of unprotected speech are permissible does not save Title VII harassment claims that are based upon unprotected offensive expression, because the nature of the Title VII claims is not viewpoint neutral. Graphic expression of the ideal of equality will not support a Title VII claim;

The one circumstance in which expression might be relied upon consistent with the first amendment to support a claim of hostile environment is when expression is used to show motive, but the expression may not be used to add weight to the assertion that the environment was hostile. Because Title VII prohibits harassment only on the basis of protected status, an employee must show that harassment taking a nonsexual or nonracial form was the product of sexual or racial animus. What is said in the context of the harassment may well shed light on the motivation. If so, it should be admissible for that purpose. However, the trier of fact should not be permitted to consider the offense engendered by the expression in determining whether the environment was a hostile one. If the trial is to a jury, the jury should be given a limiting instruction to that effect. Moreover, the court should consider carefully in such circumstances whether the potential prejudice of admitting that evidence outweighs its probative value.³⁸⁶

As a practical matter, it is precisely because of its prejudicial effect that plaintiffs often seek to introduce evidence of protected speech. Where clear evidence of bad acts is present, such evidence is not necessary. However, plaintiffs seek to support their claims by demonstrating that the defendants are "bad persons." The trier of fact need not agonize in a close case on either liability or punitive damages (under those statutes that permit such damages) if it is clear that the defendant is an odious person with odious beliefs. There are few ways more effective today to demonstrate "badness" than to show that a person is a racist or a sexist. Once it is shown that a defendant is a member of the Ku Klux Klan or a self-proclaimed "male chauvinist pig," wears "Wallace for President" buttons, or argues that blacks are fit only to be slaves and women fit only to serve the sexual needs of men, whether the defendant actually committed a specific punishable act is almost beside the point. In many circumstances, the rules of evidence have been effective in protecting defendants from prejudice by limiting introduction of "bad character" evidence. The need for such protection is no weaker in harassment cases.

As long as hostile-environment claims may be based to any extent upon expression, a pleading requirement similar to that employed by many courts in defamation cases is necessary.³⁸⁷ Courts should require the plaintiff to specify in the complaint the precise language used by the alleged harasser upon pain of dismissal. Plaintiffs should not be permitted simply to allege in conclusory terms

graphic expression of the ideal of inequality will. Unless the standard for harassment is transformed into a viewpoint-neutral one, a result seemingly inconsistent with Title VII's status as a discrimination statute, even unprotected speech may not be called upon to support a hostile-environment claim. *Cf. Thorne v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988) (upholding West Virginia telephone-harassment statute on ground that it "is clearly not a censorial statute, directed at any group or viewpoint. It seeks to protect citizens from harassment in an even-handed and neutral fashion. Indeed, the statute requires no inquiry into the content of the telephone conversation").

386. *See* FED. R. EVID. 403.

387. *See, e.g., Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 109 (3d Cir. 1988) (if "constitutional protections are to have meaning, a plaintiff must be required to set forth allegedly actionable statements with particularity"); *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 699 (8th Cir. 1979) ("the use of *in haec verba* pleadings on defamation charges is favored in the federal courts because generally knowledge of the exact language used is necessary to form responsive pleadings").

the existence of "racial slurs," "racist jokes," "sexual innuendo," "dirty jokes," "sexist remarks," "pornographic pictures," and so forth.³⁸⁸ A requirement of specificity in pleading allows defendants subject to litigation over protected expression to extricate themselves from meritless cases as quickly as possible, thereby reducing the burden on first amendment rights. If the complaint reveals that the claim is based upon speech that cannot be regulated under the first amendment, then the defendant may escape on a motion to dismiss, rather than being forced to the expense of conducting discovery only to learn that the plaintiff's claim rests wholly on protected expression.

The standards advocated in this Article are necessary to comport with the first amendment. It should be acknowledged, however, that there is some expression that is not regulable under current doctrine that in an ideal world would be regulated. Consider the supervisor who deliberately sets out to make the workplace inhospitable to employees and does so not through use of expression outside the protection of the first amendment, not through increased work assignments or lesser pay, but through daily statements that he knows will be offensive to the employee with the intent to drive the employee into resigning. Speech that is intended to cause emotional distress is entitled to little first amendment protection,³⁸⁹ especially if uttered with the conscious intent to compel an employee to resign. It is difficult to see any first amendment value in such speech and tempting to consider such expression as "conduct." If a standard could be devised that would fairly limit restrictions of expression in such contexts, the first amendment would not be imperiled, even if the restriction was not, strictly speaking, viewpoint neutral. The difficulty would be in identifying the proper cases and ensuring that no liability would attach in other cases and that an inordinate amount of expression would not be chilled. Surmounting that difficulty appears impossible.

Even a narrowly tailored exception that looked to intent would swallow the rule. Because there seldom will be direct evidence of intent—few potential plaintiffs would be lucky enough for their harasser to tell them that he intends to drive them from the workplace—circumstantial evidence of intent will be required in virtually all cases. What kind of evidence would a plaintiff be able to present? A sexual harassment plaintiff might argue, for example, that offensive statements or posted "girlie" pictures reveal that intent. After all, one intends the natural and probable consequences of his acts, and the natural and probable consequence of saying or doing something offensive is to offend. The approach of the Court of Appeals for the Third Circuit would likely become the standard: "The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course."³⁹⁰ Thus

388. In one sexual harassment case about which the author has personal knowledge, the plaintiff alleged in her complaint that her supervisors and coworkers subjected her to "pornographic radio programs." On deposition, it turned out that her complaint was that some employees listened to the "Dr. Ruth" show.

389. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

390. *Andrews v. Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990).

could an intent to drive someone from the workplace be inferred from any offensive speech, and the problems of censorship recur.

The situation with respect to coworker speech would be similar. The employee complains to management about comments she does not like; management does nothing or dismisses the comments as jokes. A failure on the part of management to put an end to the offensive speech could support a claim that management intended that the plaintiff be driven from the workplace.³⁹¹

Because courts are reluctant to grant summary judgment when intent is disputed, offensive statements will often be sufficient to get the plaintiff to trial; then, at trial, any offensive statements or pictorial material of the kind that have been discussed in this Article could be admitted for the purpose of showing intent. Because that is so, the very same kinds of self-censorship imposed by employers under current Title VII doctrine would occur. As unpalatable as it may seem, this may be one of those circumstances where we must protect speech lacking first amendment value in order to preserve the protection of speech entitled to it.³⁹²

VIII. CONCLUSION

The impulse to censor is a powerful one, and it has been given free rein under Title VII. Not only has "targeted vilification" been regulated, but much less harmful and less invidiously motivated expression has been restricted as well. That so much speech has been stifled without substantial outcry is in large measure a reflection of the powerful current consensus against racism and sexism. But it is precisely when a powerful consensus exists that the censorial impulse is most dangerous and, ironically, least necessary. The primary risk of censorship in our society today is not from a government fearful of challenge, but from majorities seeking to establish an orthodoxy for all society. When the orthodoxy is one of "equality," that risk is at its highest.³⁹³

391. Cf. *Illinois Dep't of Corrections v. Human Rights Comm'n*, 178 Ill. App. 3d 1033, 1048-49, 534 N.E.2d 161, 171 (1989) (supervisor's "repeated use of the language after [plaintiff's] numerous requests that he cease 'suggests either a deliberate course of causing discomfort or at least a deliberate and knowing disregard of her objections'") (quoting decision of administrative law judge).

392. Similarly, although "there is no constitutional value in false statements of fact," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), the Constitution nonetheless protects such statements, *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964). In other words, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U.S. at 341. See also *Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 213:

It must be recognized, of course, that a reason implicit in the breadth of the protection afforded speech is due to the judicial recognition of its own capacity to make nice discriminations. It reflects a strategy that requires that speech be overprotected in order to assure that it is not underprotected.

By the same token, to acknowledge first amendment protection of the expression of social views—even odious ones—but to allow defeasance of that protection by a showing of intent to offend or to drive from the workplace, is to extend no first amendment protection at all. Cf. *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) ("Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth").

393. See generally *Browne, Liberty vs. Equality: Congressional Enforcement Power Under the Fourteenth Amendment*, 59 DEN. L.J. 417 (1982). See also A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 191-92 (1842):

Democratic nations are at all times fond of equality, but there are certain epochs at which the passion they entertain for it swells to the height of fury Tell them not that, by this blind surrender of

The definition of "harassment" contained in the EEOC Guidelines and applied by the courts, combined with vicarious employer liability, creates a substantial chilling effect on discussion in the workplace of matters even tangentially dealing with sex and race. Acting pursuant to those Guidelines, courts have displayed remarkably little discernment among examples of expression. Once they have been labelled as racist or sexist, all such expression has been deemed regulable. Although much of the speech that has been described in this Article arguably may be regulated through appropriately narrow and specific legislation that is viewpoint neutral, the Guidelines are not the appropriate vehicle, and, in fact, are so vague and so overbroad that they may not be applied even to unprotected speech consistent with the Constitution.

The current approach to regulation of offensive speech is directly contrary to the traditional notion that noxious ideas should be countered through juxtaposition with good ideas in the hope that the bad ideas will lose out in the marketplace of ideas. To a degree perhaps unprecedented, the current attempt to stifle offensive speech can be viewed as an attempt to achieve not only an egalitarian orthodoxy of speech and action but an orthodoxy of thought itself. Consider, for example, prohibitions against employees' having sexually explicit pictures on the inside of their lockers or their reading *Playboy* (or worse) in the workplace. The justification for such regulation is not that women of delicate sensibilities might see the material and be shocked by it. Rather, the basis for the prohibition is that some people, mostly women, are offended by what the employee is thinking while he is looking at the pictures; they are offended by the way he "views"³⁹⁴—that is, "thinks about"—women.³⁹⁵

An apparently growing number of academics and judges explicitly defend limitations of expression on the ground that restricting expression will modify beliefs.³⁹⁶ Thus, Delgado states, "a tort for racist speech will discourage such

themselves to an exclusive passion, they risk their dearest interests: they are deaf. Show them not freedom escaping from their grasp whilst they are looking another way: they are blind, or, rather, they can discern but one object to be desired in the universe.

....

I think that democratic communities have a natural taste for freedom: left to themselves, they will seek it, cherish it, and view any privation of it with regret. But for equality, their passion is ardent, insatiable, incessant, invincible: they call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery.

394. See Abrams, *supra* note 86, at 1212 n.118.

395. It is not only nude pictures that some find objectionable. Because the objection is largely based upon what the viewer of the pictures is thinking while he is looking, a picture of a woman completely, but sexily, clad and exhibiting a "debauched look" may be substantially more offensive to some than a picture of a completely nude woman (or the Venus de Milo). A prudent employer operating under a system of vicarious liability will not take the risk of offending anyone and will, under current law, censor the picture because of fear of what the legal system will do to it if it does not. See *Robinson v. Jacksonville Shipyards, Inc.*, 1991 U.S. Dist. LEXIS 4678, * 11 (M.D. Fla. 1991) (enjoining possession of any "sexually suggestive" materials to read at work; material will be presumed sexually suggestive if it depicts a person of either sex "who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body").

396. Lee Bollinger has commented on the relationship between intolerance and the desire to control thought: What leads us to react with intolerance is, typically, a concern with the *mind* perceived to be at work—with the way of thinking of the person or persons, whether that be political beliefs or general attitudes or values or whatever one might call it; and, equally important, with the fact that this thinking is

speech, establish a new public conscience, and ultimately change attitudes."³⁹⁷ It should not be concluded that the censorship advocated is solely for protection of the target; Delgado seeks also to protect the speaker. In a passage reminiscent of the Soviet attempt to label political dissidents mentally ill, he argues: "Bigotry harms the individuals who harbor it by reinforcing rigid thinking, thereby dulling their moral and social senses and possibly leading to a 'mildly . . . paranoid' mentality."³⁹⁸

The "thought-control" rationale for restricting expression is not confined to academic commentary. A similar justification for limitation of speech was provided by the Sixth Circuit in *Davis v. Monsanto Chemical Co.*:³⁹⁹ "By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society."⁴⁰⁰ Thus is the "freedom to think as you will and to speak as you think," so celebrated by Justice Brandeis,⁴⁰¹ converted to a duty to think as you are told and to speak as you are told to think.

It is but a small step from requiring a person to refrain from expressing beliefs in the hope that he will cease to hold them to requiring a person to express beliefs in the hope that he will begin to hold them. If the state may justify a prohibition on a person's saying "blacks are inferior" by pointing to the effect of the prohibition on a person's beliefs, the state should have equivalent power to require that a person affirm a belief in racial equality on the ground that repeated affirmation will cause the person to come to believe it, and, once having come to believe it, to conform his actions to his newly acquired beliefs. Thus, the state could require as a condition of holding public employment—or

essentially being communicated by the actions of those who hold, or appear to hold, these different beliefs, attitudes, or values.

L. BOLLINGER, *supra* note 362, at 112.

397. *Professor Delgado Replies*, *supra* note 302, at 595. R. George Wright suggests a similar justification: "Assuming that legal restraints on legal speech deter racist speech, genuine social gains may result. Enforced behavioral change, in the form of avoiding racist speech, may tend to produce genuine attitudinal change, as persons bring their attitudes into line with their non-racist speech."

Wright, *supra* note 235, at 23-24. Mari Matsuda also would justify regulation on the basis of its impact on beliefs: "Racism as an acquired set of behaviors can be dis-acquired, and law is the means by which the state typically provides incentives for changes in behavior." Matsuda, *supra* note 256, at 2361.

398. Delgado, *supra* note 3, at 140. Delgado also argues: "[b]igotry, and thus the attendant expression of racism, stifles, rather than furthers, the moral and social growth of the individual who harbors it." *Id.* at 176.

Of course, if all it took to justify regulation of speech was a determination that it "stifles . . . the moral and social growth of the individual," we could limit expression of any ideas that we did not value. Some might argue that Marxism stifles the moral and social growth of the individual, while others might argue that laissez-faire capitalism does the same. Educators across the country believe that Bart Simpson stifles the moral and social growth of the individual, although the Nielsen ratings suggest that a substantial segment of the population either does not agree or does not care. See *A Giant Case of Simpsonitis*, Chicago Tribune, Style Section, at 12, (June 13, 1990).

399. 858 F.2d 345, 350 (6th Cir. 1988).

400. The Third Circuit has endorsed this view as well. *Andrews v. Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (quoting *Davis*, 858 F.2d at 350).

401. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

attending public school — that an applicant sign an “equality oath,” affirming a belief in the equality of the races and sexes.⁴⁰²

In addition to its Orwellian overtones, the assumption that beliefs can be altered by forbidding expression is probably wrong.⁴⁰³ As Paul Chevigny has suggested in the context of the debate over pornography regulation, propaganda—whether in the form of “anti-female” pornography or racist expression—appeals only to those whose systems of belief make them receptive to the representations.⁴⁰⁴ Suppressing pornography (or racist speech) is “beside the point in a cognitive world where we can interpret new experience only through existing patterns.”⁴⁰⁵ The only effective method of altering a world view that is deemed pernicious is to provide a persuasive response—that is, “more speech.”⁴⁰⁶ “Shut up!” is not a persuasive response.

Although the contrary is sometimes asserted,⁴⁰⁷ challenging censorship is not to cast one’s lot with those censored or to minimize the substance of the opinions of those urging censorship. Instead it is to accept the fundamental *constitutional* truth that the government may not establish a fundamental *moral* truth through suppression of expression. Probably everyone reading this Article would agree that the world would be a better place without much of the expression that is described in the harassment cases. It does not follow, however, that the world would be a better place if elimination of such expression is compelled by the threat of governmental sanctions. Persuasion that the offensive views are wrong or that they not be expressed where they are unwelcome is a far better solution than “silence coerced by law—the argument of force in its worst form.”⁴⁰⁸

402. *But see* *Wooley v. Maynard*, 430 U.S. 705 (1977) (prohibiting state from punishing motorist for taping over license plate motto, “Live Free or Die” on ground that state lacks authority to compel endorsement of governmental positions); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down mandatory Pledge of Allegiance in public school).

403. *See* Heins, *supra* note 273, at 586-87 (1983) (“Delgado . . . makes no attempt to show that as a matter of psychology punishing name-calling is a means of changing deeply-held attitudes”).

404. Chevigny, *Pornography and Cognition: A Reply to Cass Sunstein*, 1989 DUKE L.J. 420, 432.

405. *Id.*

406. *But see* *Wright*, *supra* note 235, at 21 (suggesting that having to rely on “some sort of ‘counterspeech’ remedy” is “degrading”).

407. *See Professor Delgado Replies*, *supra* note 302, at 596 (arguing that criticism of his earlier article, *Words that Wound*, *supra* note 3, by a staff attorney for the ACLU, was based on fact that organization “is composed mostly of white, male, middle-class lawyers who care a great deal about free speech” and who “rank speech over the right of women to be free from pornographic exploitation and the right of elderly Jewish survivors to be free from painful reminders of the Holocaust”) (footnotes omitted).

408. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).